

No./N/139/140/141/142/143 /2019,

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
No.16, C-1, Millers Tank Bed Area, Vasanth Nagar, Bengaluru-560 052.**

Dated: 31.12.2020

Present

Shri Shambhu Dayal Meena	: Chairman
Shri H.M. Manjunatha	: Member
Shri M.D. Ravi	: Member

1. OP No.48/2019

BETWEEN:

Messrs Fortum Solar India Private Limited,
1A, Vandana Buliding
11, Tolstoy Marg,
Adani House, Nr. Mithkhali Six Roads,
New Delhi-110 001.

.... PETITIONER

[Petitioner represented by M/s HAS Advocates]

AND:

Bangalore Electricity Supply Company Limited,
Office at K.R. Circle,
Bengaluru-560 001.

.... RESPONDENT

[Respondent represented by M/s Just Law Advocates]

2. OP No.49/2019

BETWEEN:

Messrs Fortum Solar India Private Limited,
1A, Vandana Building,
11, Tolstoy Marg,
New Delhi-110 001.

... PETITIONER

[Petitioner represented by M/s HAS Advocates]

AND:

Hubli Electricity Supply Company Limited,
P.B. Road, Navangar,
Hubballi .

.... RESPONDENT

[Respondent represented by Sri Shahbaaz Hussain, Advocate]

3. OP No.50/2019

BETWEEN:

Messrs Fortum Solar India Private Limited,
1A, Vandana Buliding,
11, Tolstoy Marg,
New Delhi-110 001.

.... PETITIONER

[Petitioner represented by M/s HAS Advocates]

AND:

Chamundeshwari Electricity Supply Company Limited,
No.29, Vijayanagara, 2nd Stage,
Mysore-570 017.

.... RESPONDENT

[Respondent represented by M/s Just Law Advocates]

4. OP No.51/2019

BETWEEN:

Messrs Fortum Solar India Private Limited,
1A, Vandana Buliding,
11, Tolstoy Marg,
New Delhi-110 001.

.... PETITIONER

[Respondent represented by M/s HAS Advocates]

AND:

Bangalore Electricity Supply Company Limited,
Office at K.R. Circle,
Bengaluru-560 001.

.... RESPONDENT

[Respondent represented by M/s Just Law, Advocates]

5. OP No.52/2019**BETWEEN:**

Messrs Fortum Solar India Private Limited,
1A, Vandana Building,
11, Tolstoy Marg,
New Delhi-110001.

.... PETITIONER

[Respondent represented by M/s HAS Advocates]

AND:

Mangalore Electricity Supply Company Limited,
MESCOM Bhavana,
Kavoor Cross Road,
Bejai, Mangalore-575 004.

.... RESPONDENT

[Respondent represented by Sri Shahbaaz Hussain Advocate]

COMMON ORDERS

1. These Petitions involve common questions of facts and law, therefore, we clubbed all these cases, heard together and proposed to pass the common order. In all the petitions the relief prayed for are similar.
2. These Petitions are filed under Section 86(1)(f) and other provisions of the Electricity Act, 2003 by the Petitioners praying for the following reliefs;
 - a) To declare, acknowledge and hold that the imposition of Safeguard Duty on the import of Solar Modules pursuant to the SGD Notification issued by the Department of Revenue, Ministry of Finance, amounts to a Change in Law Event as per the PPAs dated 24.07.2018; 25.07.2018 and 27.07.2018 with effect from 30.07.2018;
 - b) To determine the appropriate and proportionate increase in tariff due to imposition of Safeguard Duty and, accordingly, amend the tariff specified in the PPAs dated 24.07.2018; 25.07.2018 and 27.07.2018.

- c) To direct the Respondents (BESCOM/HESCOM/CESC/MESCOM) to reimburse the Petitioner for the actual additional expenditures incurred by it as set out in detail under paragraphs 10 and 26, read with the other relevant submission, of the present petition along with carrying cost from the date of incurring the expense to the date of actual payment by BESCOM/HESCOM/ CESC/MESCOM and other associated costs;
- d) Pass such other or further orders as the Commission may deem fit in the interest of Justice.

3. The Petitioners have entered into separate Power Purchase Agreements (PPAs) with the Respondents for setting up of the Solar PV ground mounted projects. The particulars of different Solar Projects involved in these cases are set out as in the following table:

Sl. No.	Petition No & Name of Project & Location	Capacity	Block No.	Date of Acceptance of letter (LoA)	Date of signing PPA with concerned ESCOM	Date of approval of PPA	Period allowed as per PPA for SCOD
1	Petition No.48/2019 Fortum Solar India Pvt.Ltd Pavagada	50 MW _{AC}	B- 9	03.07.2018	24.07.2018 BESCOM	27.08.2018	12 months
2	Petition No.49/2019 Fortum Solar India Pvt.Ltd Pavagada	50 MW _{AC}	B- 14	03.07.2018	27.07.2018 HESCOM	27.08.2018	12 months
3	Petition No.50/2019 Fortum Solar India Pvt.Ltd Pavagada	50 MW _{AC}	B -20	03.07.2018	25.07.2018 CESC	27.08.2018	12 months
4	Petition No.51/2019 Fortum Solar India Pvt.Ltd Pavagada	50 MW _{AC}	B -5	03.07.2018	24.07.2018 BESCOM	27.08.2018	12 months
5	Petition No.52/2019 Fortum Solar India Pvt.Ltd Pavagada	50 MW _{AC}	B- 40	03.07.2018	27.07.2018 MESCOM	27.08.2018	12 months

4. The brief facts set out in these petitions are as under:

- a) Karnataka Renewable Energy Development Limited (KREDL) is a Nodal Agency of the Government of Karnataka (GoK) for facilitating the development of Renewable Energy in the State of Karnataka. GoK had resolved to undertake allotment of 650 MWs (50MW x 13 Blocks) Grid Connected Ground Mounted Solar Photovoltaic Projects to be implemented in Pavagada Solar Park in the State of Karnataka on "Build-Own-Operate" basis under open category only for procurement of Solar Power by the Karnataka Electricity Supply Companies for a period of 25 years.
- b) Pursuant thereto, KREDL had issued the Request for Proposal(RfP) dated 23.04.2018(Annexure-P2) inviting bids for development of Grid-Connected Ground Mounted Solar Photovoltaic Projects of 650 MW capacity (50MW x 13 Blocks) at Pavagada Solar Park.
- c) The petitioner herein was declared as a successful bidder at tariff of Rs.2.85/kWh and a 'Letter of Award (LoA) dated 29.06.2018 (Annexure-P3) was issued to it by KREDL. By way of the said letter of award, KREDL was pleased to award and allot different Five (5) Blocks at Pavagada Solar Park with each of 50 MW capacity ("Project") in favour of Fortum Solar India Private Limited.
- d) The said LoA was acknowledged and duly accepted by Fortum Solar India Private Limited vide its letter dated 03.07.2018.

- e) In furtherance of the above, Power Purchase Agreements were executed on different dates with the Respondents for setting up of the Projects of 50 MW capacity each. As per the PPA, the SCOD of the Project is 12 months from the Effective Date i.e., 12 months from the date of obtaining concurrence of the KERC on the PPA.
- f) Thereafter, the Department of Revenue, Ministry of Finance, Government of India by way of its Safeguard Duty Notification No.01/2018-Customs (SG), New Delhi, dated 30.07.2018 ("SGD Notification"), introduced safeguard duty at the following rates on the import of Solar Cells (whether or not assembled in modules or panels) from certain countries, including China:

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%

- g) The Commission vide Letter No. KERC/S/F-31/Vol-1270/18-19/811 dated 28.08.2018, adopted the tariff of Rs.2.85/kWh for the Project under Section 63 of the Electricity Act, 2003 and conveyed its approval to the PPA executed between Fortum Solar India Private Limited and ESCOMs.
- h) It is pertinent to note that the petitioners directly placed the orders for purchase of modules from a vendor, namely, Wuxi Sun tech Power Company Limited & Jinko Solar Company Limited (based in China) and received all the Solar Panels at the Chennai Port during the period January

2019 to May 2019, thereby attracting the imposition of Safeguard Duty @ 25%.

- i) It is pertinent to note that, the petitioners have been proactive in its efforts and has managed to commission, the project in advance of the Schedule Commissioning of Date (SCOD).
- j) The SGD Notification and the consequent imposition of safeguard duty has resulted in an increase in expenditure for the petitioners and, as evident from the above, submission that Fortum Solar India Private Limited was forced to bear an additional cost. This has adversely impacted the business of the petitioners and, in view of the above, the petitioners are constrained to file the present petitions.
- k) The power to levy safeguard duty vests with the Central Government in terms of Section 8B of the Customs Tariff Act, 1975 ("Customs Tariff Act"). Section 8B of the Customs Tariff Act provides that the Central Government may impose safeguard duty by way of a notification on the import of an Article into India, if it is satisfied that the said goods are being imported in such increased quantities and under such circumstances so as to cause or threaten to cause serious injury to the domestic industry.
- l) Rule 12 of the Customs Tariff (Identification and Assessment of Safeguard Duty Rules) 1997 ("Safeguard Duty Rules") provides that the Central Government may impose safeguard duty shall not exceed the amount found adequate to remedy the serious injury to the domestic industry.

Further, Rules 14 and 17 of the Safeguard Duty Rules provide for the 'date of commencement of duty' and 'liberalization of duty' respectively.

- m) In this context and in exercise of the powers conferred by Sub-section (1) of Section 8B of the Customs Tariff Act read with Rules 12,14 and 17 of the Safeguard Duty Rules, the Government of India issued the SGD Notification No.01/2018- Customs (SG) on 30.07.2018 imposing safeguard duty on the import of solar cells (whether or not assembled in modules or panels) at the rates prescribed thereunder. Thus, with effect from 30.07.2018, the import of solar cells and modules into India is subjected to levy of a safeguard duty (in the nature of a tax) at the rate of 25% ad valorem minus Anti-dumping duty if any, for the first year of imports, where after, the safeguard duty is progressively liberalized.
- n) Article 15 of the PPA deals with the Change in Law, and reveals the following:
- a) A change in Law events is any event as enumerated under Article 15.1.1 which has a direct bearing on the project;
 - b) such event of Change in Law must have occurred after the submission of Online Techno-commercial Bid;
 - c) The Change in Law so claimed must result in any additional recurring/non-recurring expenditure by the solar power developer or any income to the solar power developer.
- o) At the outset it is pertinent to note that safeguard duty is in nature of a tax imposed/introduced/applied on the import of solar cells and modules by way of SGD notification dated 30.07.2018. Introduction of safeguard duty

- by virtue of the SGD notification would be covered by the phrase “introduction of any taxes, duties and cess which have a direct effect on the project” on account of the fact that safeguard duty qualifies as tax imposed on the “solar cells and modules” which are the primary components in setting up of a solar power plant. Thus, the introduction and imposition of safeguard duty on imported solar modules has resulted in an additional expenditure by the solar power developer. Further, it is pertinent to note that a bidder (including the present petitioner) is obligated to consider and include in its bid, all the taxes, duties and cess applicable on the last date of submission of the technical bid. In the present case, the online Techno-Commercial Bid was submitted on 18.06.2018 whereas the SGD notification was issued on 30.07.2018 i.e. subsequent to the online submission of Techno-Commercial Bid. Therefore, the SGD notification dated 30.07.2018 is squarely covered by the ‘Change in Law’ contemplated between the parties under the PPA.
- p) The SGD notification is covered under sub-clauses (a), (b) and (e) of Article 15.1.1 of the PPA and has resulted in additional expenditure for the petitioner, and for which, the petitioners must be compensated by ESCOMs as per the provisions of the PPA.
- q) Para 5.7.1 of the Bidding Guidelines states that, if a Change in Law Event results in any adverse financial loss/gain to the solar power generator, the solar power generator/procurer shall be entitled to compensation by the

other party, in order to ensure that the solar power generator is placed in the same financial position as it would have been, had it not been for the occurrence of the Change in Law event.

- r) It is submitted that restitution is an integral part of compensation granted for Change in Law and carrying cost in simple terms is the compensation for the time value of money. The Hon'ble Supreme Court of India in the case of *Yadava Kumara v. National Insurance Co. Ltd., (2010) 10 SCC 341* while interpreting the term "compensation" was pleased to note that a compensation is granted to put back the injured party to the same position, as far as possible, as if such injury had not occurred. Further, the Hon'ble Appellate Tribunal for Electricity in Appeal No.210 of 2017, Appeal No.193 of 2017 and Appeal No.111 of 2017 has allowed carrying cost upon the amount allowed as compensation for 'Change in Law' events.
- s) The petitioners have incurred additional costs due to the introduction/imposition of safeguard duty for which they have to be compensated along with the carrying cost. According to them the following are the impact on account of safeguard duty in respect of each petition:

Sl. No.	Petition Nos.	Impact of SGD (in Rs.)
1	OP No.48/2019	28,79,95,571
2	OP No.49/2019	29,09,70,940
3	OP No.50/2019	29,22,99,717
4	OP No.51/2019	27,72,44,397
5	OP No.52/2019	31,70,06,245

- t) Section 86 (4) of Electricity Act, 2003 mandates that, this Commission while discharging its functions under the Electricity Act, 2003 will be guided by the provisions of National Tariff Policy, 2016. Clause 6.2(4) of the National Tariff Policy also clearly states that any change in taxes imposed by the Central Government after the award of bids has to be treated as 'Change in Law' unless otherwise provided for in the PPA. The petitioners also furnished the relevant provisions of the National Tariff Policy 2016 which are reproduced as below:

"6.2 Tariff Structuring and Associated issues:

"(4) After the award of Bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Government/Union Territories or by the Government Instrumentality leading to corresponding changes in the cost, the same may be treated as 'Change in Law' and may unless provided otherwise in the PPA be allowed to pass through subject to approval of Appropriate Commission".

The National Tariff Policy, 2016 envisages that introduction of a new duty or tax post submission of the bid has to be treated as a 'Change in Law' event unless otherwise provided for in the PPA. As already elaborated above, the PPA executed by Fortum Solar India Private Limited with ESCOMs clearly stipulates that introduction of any tax shall be treated as 'Change in Law' under Article 15.

- U) The SGD notification was introduced upon recommendation of the Directorate General of Trade Remedies, in its final findings on 16.7.2018, itself held that, the safeguard duty recommended to be imposed would be covered as a 'Change in Law' Event under the respective PPAs of the solar power developers.
- v) The entire bidding in the present cases have been carried out by KREDL as per the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects issued by Ministry of Power vide Notification No.23/27/2017-R&R dated 03.08.2017 and the said Bidding Guidelines have been issued under the provisions of Section 63 of the Electricity Act, 2003 for the long term procurement of Electricity by distribution licensees, from grid-connected Solar PV Power Projects having a size of 6 MW and above through Competitive Bidding.
- w) In view of above reasons, the petitioners pray to allow the above petitions.
5. In response to the notice, the respondents appeared through their Counsels and filed separate Statement of Objection. The gist of the Statement of Objection is as follows:
- a) The respondents have admitted that the petitioners are the successful bidder for development of a 50 MW_{AC} capacity Solar PV ground mount project at different Blocks in Pavagada Solar Park in Karnataka,

accepted the Letter of Award (LoA) issued by KREDL, executed these PPAs and which are concurred by the Commission. It is the case of the petitioners, that the imposition of safeguard duty on the import of Solar Cells and Modules from China, pursuant to the Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 should be treated as a "Change in law" event. The terms of Article 15.1 (e) of the PPA state that "any change in law pertaining to taxes, and cess after the date of submission of Technical Bid shall be to the account of BESCO." The petitioners contended that since solar cells and modules are the primary component in the setting up of the Solar Power Plant and as on the date of the submission of the Techno-Commercial Bid on 18.06.2018 as well as the Effective Date (29.08.2018), no safeguard duty was leviable on the import of Solar Cells and Modules, resultantly, the imposition of the safeguard duty notification should trigger the change in law clause of the PPA.

- b) Further, the respondents contended that the petitioners are not entitled for the relief of change in law under Article 15 of the PPA, as the grievance of the petitioners is based on facts and circumstances that could have easily been avoided by the petitioners. It ought to be noted that the safeguard duty notification produced at Annexure-P1 of the petition, allows the import of the subject goods "solar cells whether or not assembled in modules or panels," from countries notified as developing countries [vide Notification No. 19/2016-Customs (N.T.) dated 05.02.2016,

except China and Malaysia] and such import would be exempt from the levy of safeguard duty. The safeguard duty notification was issued on 30.07.2018 and the solar panels were ordered by the petitioner much later than the safeguard duty notification was issued. The petitioners were in full cognisance of the contents of the SGD notification and the exemption on the levy of safeguard duty on solar panels imported from developing countries, proceeded to import solar panels from China knowingly well the same would attract the safeguard duty. It is submitted that it was entirely possible for the petitioners to avoid the payment of the safeguard duty by importing the solar cells from the countries notified as developing countries, in which event the duty would not be levied and no 'Change in Law' event would have occurred. It is submitted that the petitioners are seeking the benefit of 'Change in Law' event by attracting the levy of safeguard duty in spite of knowing the content of the notification and now they are seeking to pass the burden of the same to the respondents who were not consulted prior to such a decision being made by them.

- c) The rates for the solar modules purchased by the petitioners from Jinko Solar Company Limited (based in China) which are stated in the invoices produced by the petitioners are valued in US Dollar 0.225 per Watt (converted to INR comes to Rs.15.854). Safeguard duty at the rate of 25% on the said amount, comes to Rs.3.964 per Watt and 5% IGST on

safeguard duty amounts to Rs.0.198 and the total cost of a solar module per watt amounts to Rs.20.016 when imported from China as per the data produced by the petitioners at Annexure-P7. It is submitted that the minimum cost of a solar module purchased from an Indian manufacturer is approximately Rs.20 per watt and solar modules purchased from Tata Power Solar and Adani Solar are even more economical at the rate of Rs.18 per Watt. Additionally, Indian manufacturers would also be eligible for a government subsidy on the same which would make the panels purchased from an Indian manufacturer far more economical than those purchased from China. The safeguard duty is levied on the purchase of foreign products, primarily during the periods of import surge in order to protect domestic manufacturers and ultimately encourage the purchase of products from domestic manufacturers and to discourage their purchase from foreign entities.

- d) The petitioners were in full cognisance of this fact, but have chosen to disregard the contents of the safeguard duty notification, by wilfully entering into an agreement for the import of solar modules from a Chinese firm after the coming into effect of the notification, knowing that such import would attract the levy of the duty. In view of the Petitioner's blatant disregard for the contents of the notification and the intention of the Government of India to discourage purchase of goods from foreign entities to the detriment of their local counterparts. It would defeat the

entire purpose of the notification for the safeguard duty to be paid by the respondent which is a government electric distribution company rather than the petitioner, a wilful purchaser of the foreign goods. This solar project was undertaken in public welfare, and the respondents, being a wholly owned government company providing an essential service to the public at large should not be made to bear the cost of the petitioner's wilful disregard for the contents of the safeguard duty notification despite having every opportunity to proceed to establish the solar plant by utilising panels which do not attract the levy.

- e) The petitioners have sought the reimbursement of amount stated in the petitions towards the safeguard duty and IGST on the safeguard duty payable on the solar modules purchased and have furnished commercial invoices, bills of entry and receipts towards the same. The documents produced by the petitioners at Annexure-P7 (Colly) of the petition, containing the details of the commercial invoice numbers, dates, number of modules, watts, unit prices in US Dollar and total amounts etc. From a perusal of Annexure-P7, it is clear that the total quantity of modules procured by the petitioner, the corresponding watts able to be produced from the same are more than contracted capacity. The capacity of the solar power plant contracted for by the respondent with the petitioner as per the PPA produced at Annexure-P5 of the petition is 50 MW in total, which is 5,00,00,000 watts. The number

of solar modules required in order to generate the 50 MW contracted capacity is Rs.1,49,254. As per the documents provided by the petitioner, there is an excess of solar modules purchased which can produce an excess of energy. The petitioners have declared the Capacity Utilisation Factor (CUF) of the solar plant is to be in the range of 18% to 30% and has assured the respondents that the maximum supply of energy in a year will be 131.76 million units. The quantity of solar panels purchased by the petitioners; the capacity producible of energy from the same is more than contracted capacity of energy. The documents produced by the petitioners is at Annexure-P7 (Colly). It is clear from the above documents that the petitioners have purchased a quantity of solar panels grossly in excess of what was contracted for supply of energy and is resultantly seeking to mislead the respondent as well as this Commission with the astronomical sums claimed for. The claims of the statement are as follows:

OP No. 48 of 2019.

(Amount in Rupees)

	Total Quantity of Solar Modules (Number of Modules)	Total Watts that can be produced	Safeguard Duty + GST on SGD claimed (Rs.)
As per invoices produced by the Petitioner	2,06,451	6,91,61,085	28,79,95,571
For the Contracted Capacity (50 MW)	1,49,254	5,00,00,000	20,82,06,371
Excess number of Solar Modules Imported	57,197	1,91,61,085	7,97,89,200

OP No. 49 of 2019.

(Amount in Rupees)

Sl. No.	Invoice No.	BOE no & Date	Safeguard Duty @ 25% paid	IGST Paid on Safeguard Duty paid	Total Impact on A/c of SGD + IGST	Total Challan Amount* (in Rupees)	Payment Confirmation Number & Date
1	Fortum 2019-0180	2607103 Dt.14.03.2019	3,07,97,166	15,39,858.32	3,23,37,025	3,85,12,278.00	208752510 Dt.30.03.2019
2	Fortum 2019-0190	2791901 Dt.27.03.2019	2,38,47,952	11,92,397.61	2,50,40,350	2,98,46,692.00	211082160 Dt.15.04.2019
3	Fortum 2019-0210	2804587 Dt.27.03.2019	1,49,04,970	7,45,248.50	1,56,50,219	1,86,31,213.00	211082160 Dt.15.04.2019
4	Fortum 2019-0220	2885803 Dt.03.04.2019	2,38,47,952	11,92,397.61	2,50,40,350	2,98,09,960.00	2026725630 Dt.22.04.2019
5	Fortum 2019-0240	2885797 Dt.09.04.2019	3,87,52,922	19,37,646.11	4,06,90,568	4,84,41,153.00	2026725664 Dt.22.04.2019
6	Fortum 2019-0250	2989945 Dt.10.04.2019	1,51,08,854	7,55,442.69	1,58,64,296	1,88,86,067.00	213072117 Dt.30.04.2019
7	Fortum 2019-0260	2989946 Dt.10.04.2019	2,26,63,281	11,33,164.03	2,37,96,445	2,83,52,385.00	212868021 Dt.29.04.2019
8	Fortum 2019-0280	3188214 Dt.29.04.2019	2,49,47,314	12,47,365.72	2,61,94,680	3,11,84,143.00	215254526 Dt.15.05.2019
9	Fortum 2019-0340	3348277 Dt.08.05.2019	4,04,65,009	20,23,250.43	4,24,88,259	5,05,81,260.73	216378376 Dt.24.05.2019
10	Fortum 2019-0370	3452076 Dt.16.05.2019	3,79,62,307	18,98,115.37	3,98,60,423	4,74,52,884.17	217224667 Dt.31.05.2019
11	Fortum 2019-0400	3452019 Dt.15.05.2019	38,17,454	1,90,872.68	40,08,326	47,71,817.05	217224667 Dt.31.05.2019
Total impact on account of Safeguard Duty					29,09,70,940		

OP No. 50 of 2019.

(Amount in Rupees)

	Total Quantity of Solar Modules	Total Watts that can be produced	Safeguard Duty + GST on SGD claimed (Rs.)
As per invoices produced by the Petitioner	2,11,632	7,08,96,720	29,22,99,717
For the Contracted Capacity (50 MW)	1,49,254	5,00,00,000	20,82,06,371
Excess number of Solar Modules Imported	62,378	2,08,96,720	8,40,93,346

OP No. 51 of 2019.

(Amount in Rupees)

	Total Quantity of Solar Modules	Total Watts that can be produced	Safeguard Duty + GST on SGD claimed (Rs.)
As per invoices produced by the Petitioner	1,97,834	6,61,82,742	27,72,44,397
For the Contracted Capacity (50 MW)	1,49,254	5,00,00,000	20,82,06,371
Excess number of Solar Modules Imported	48,580	1,61,82,742	6,90,38,026

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Sl. No.	Particulars (Invoice No's)	Total quantity of Solar Modules	Total Watts that can be produced	Rating of panel (in WP)	Value of Solar panels (USD)	Value of Solar panels (in Rs)	Safeguard Duty (Rs)	IGST @ 5% on SGD (Rs)	Safeguard Duty+IGST (Rs)	
1	As per Invoices Produced by the Petitioner									
1	Z2019041824	11804	3954340	335	913847.97	64380589.77	16095147	804758	16899905	
2	Z2019041837-1	18330	6048900	330	1397900.79	98482110.66	24620528	1231026.4	25851554.4	
3	Z2019041885-1	14950	5008250	335	1157406.58	81539293.21	20384823	1019242	21404065	
4	Z2019041886-1	14924	4999540	335	1155393.69	81397485.74	20349371	1017468.55	21366839.55	
5	Z2019041889-1	41808	14005680	335	3236712.65	228026406.1	57006602	2850330.1	59856932.1	
6	Z20190507055-1	9490	3179150	335	734701.57	52274017.03	13068504	653425.2	13721929.2	
7	Z20190507054-1	36374	12185290	335	2816020.52	200359860	50089965	2504498.25	52594463.25	
8	Z20190418101	41782	13996970	335	3234699.77	230148888.4	57537222	2876861.1	60414083.1	
9	Z20190531055	32448	10870080	335	24294662.88	170134186.8	42758547	2137927.35	44896474.35	
	Total	221910	74248200	335	17076146	1206742838	301910709	15095536.95	317006246	
	For the contracted capacity of 50MW*	1494385	50000000			812641139.9	203311804	10165590.18	213477393.7	
	Excess	72472	24248200			394101698	98598905	4929947	103528852.3	
	Agreement made on	20.04.2018								
	*Calculations for total of Solar modules required	Total quantity of Solar Modules/Total Watts that can be produced X 50000000								
	Value to solar panel 149438									812641139.9
	SG Duty for 149438 Modules	Safeguard duty /Total Watts that be produces X Total value								203311803.5
	IGST for 149438 Modules	IGST for 149438 Modules								10165590.18
	SGD + IGST for 150691 modules	Safe guard Duty +IGST								213477393.7
	Excess (24.24MW)	Already claimed in invoices (-) revised as per PPA modules cost								103528852.3

- f) The petitioners have also prayed for the grant of interest carrying cost (to be restored to the same economic position as if the alleged 'Change in Law' had not occurred) from the date of the impact until the reimbursement thereof by the respondent. The petitioners have relied on Para 5.7.1 of the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" (Tariff Guidelines) issued by the Ministry of Power under Section 63 of the Electricity Act, 2003, vide notification bearing number 23/27/2017-R & R dated 03.08.2017 which states that "In the event a Change in Law results in any adverse financial loss/gain to the solar power generator then, in order to ensure that the solar power generator to be put in the same financial position as it would have been, had it not been for the occurrence of the change in law, the solar power generator/procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission".
- g) With regard to carrying cost, the law stands settled that only if there is a provision in the PPA for the restoration of the developer/seller to the same economic position as if no 'Change in Law event has occurred, the developer/seller is eligible for carrying cost for such allowed 'Change in Law' event until the same is allowed by the appropriate authority by an Order/ Judgment. In the present case, neither does the PPA entered into

between the parties contain a single provision that permits / stipulates restoring the solar power generator to same financial position as prior to the 'Change in Law, nor does it contemplate the payment of carrying cost or interest of any kind to the aggrieved party on account of a 'Change in Law'. In this regard, reliance is place on the decision rendered by the Hon'ble CERC in the matter of petition No. 188/MP/2017, in case of ACME Bhiwadi Solar Power Private Limited Vs. Solar Energy Corporation of India Limited & Others wherein upon analysing this issue in depth it came to the reasoned decision that unless carrying cost is stipulated in the PPA, the aggrieved party is not entitled to it.

- h) In view of the order of CERC in petition No.188/MP/2017, it is submitted that the petitioners are not entitled to the relief of restoration to the previous financial position, and interest/carrying cost from the date of impact till the date of reimbursement by the respondents in view of the fact that the PPA entered into by both parties contains no provision for such relief. The PPA, is a legally binding contract entered into by the parties, reflecting the intention of both parties and the petitioners are bound by the terms of the same.
- i) The petitioners have also relied upon a recommendation of the Directorate General of Trade Remedies based on its final findings dated 16.7.2108 vide its File No.22/1/2018-DGTR, as well as the National Tariff Policy,2016 with respect to changes in taxes and 'Change in Law' which

states that after the award of bids, if there is a change in domestic duties, levies, taxes, etc., imposed by the Central or State Government, leading to corresponding changes in cost, the same may be treated as change in law and may unless provided otherwise in the PPA be allowed to pass through. What the petitioners have failed to recognise is that the policy clearly directs that the said duty may “be allowed as pass through subject to the approval of the Appropriate Commission.” In view of the same, the content of the policy, does not, in the present case guarantee the treatment of safeguard duty to be allowed as a ‘Change in Law’ but it merely directs that the appropriate commission determine as to whether the levy of safeguard duty should be considered a ‘Change in Law’ based on the facts of the present case, through the course of the present proceedings.

- j) It is clear from a perusal of the Article 5.1.1 of the PPA dated 24.07.2018 that the solar power developer; in this case the petitioner; is responsible for the payment of all taxes and duties imposed by the Government in relation to all works connected to the project. It is in cognizance of this fact that the petitioner has bid in response to the Request for Proposal of the respondent. The bid of an eligible bidder (i.e. the petitioner) is an all-inclusive bid that includes the cost of any existing foreseeable taxes and duties as stipulated in the Article 5.1.1 of the PPA, such as anti-dumping duty etc. The respondents herein accepted the bid of the petitioners on

the understanding that the petitioner had factored into its bid any expenditure to be incurred by it on account of the payment of taxes and issued its Letter of Award (LoA). The petitioner subsequently entered into a PPA with the respondent in full knowledge of their obligations under the said PPA including the payment of taxes and duties. The petitioners now are seeking to benefit from the application of the safeguard duty notification contending that the duty payable by it amounts to the same percentages stated in the safeguard duty notification, (i.e., 25% safeguard duty which would be progressively liberalised with an additional IGST of 5% of the value of the safeguard duty but have however neglected to account for the proviso to the rates stated in the notification which proposes the levy of the duty "minus anti-dumping duty payable, if any". The petitioners have approached this Commission with unclean hands and are seeking to be compensated for the entire safeguard duty stated in the notification rather than the actual duty after the deduction of anti-dumping duty payable, which is what the notification truly seeks to levy. The petitioners have already been compensated for the cost of anti-dumping duty payable by it in view of the fact that it was included in the cost of the petitioner's bid vide the agreed upon terms of the PPA. The only 'Change in Law' benefit, if any, payable to the petitioners would be the difference in the rates stated in the safeguard duty notification and the anti-dumping duty payable. The petitioners ought to make available a statement of the difference payable, if any, including the cost of anti-

dumping duty paid, in order to ascertain whether any additional duty has been levied at all.

6. Apart from the above, the respondents have also denied the contents of the each of the paras of these petitions.

7. The respondents in OP No.49/2019 and OP No. 52/2019 raised the same contentions as raised by the respondents in OP No.48/2019, OP No. 50/2019 and OP No.51/2019. Apart from that, the following contentions were also raised by them.

a) The Article 5.1.1 (g) of the PPA makes in unequivocal terms that the petitioner shall exclusively be responsible for taxes, duties or levies to be levied with respect to the implementation of the project. Any change in the applicable taxes shall also be borne by the petitioner as the same has been casted as an obligation on the petitioner under Article 5.1.1 (g) of the PPA. Furthermore, the said Article does not subject itself to the Article 15 on change in law, which leads to the conclusion that any change in tax rates or laws shall be borne by the petitioner without being entitled to any kind of compensation.

b) The petitioners have not produced any documents evidencing the lack of availability of solar cells in India and also not placed any data or document to show that they explored the price quotes of solar cells from other countries and from Indian manufacturers. The petitioners could have purchased the required solar cells from India at competitive rate without

attracting the safeguard duty. It is a settled principle of law that he who seeks compensation shall establish the same without any doubt. The petitioners in the instant case, have not produced any data to show that they deserve any compensation.

- c) The respondent in OP 52 of 2019, submitted a sample invoice from one of the manufacturers of solar cells from Karnataka namely. M/s Emmvee Photovoltaic Power Private Limited which is a company with its registered office in Bangalore, which manufactures the solar cells and such cells meet the standards and specifications set by the Chief Electrical Inspector to Government of Karnataka in his letter dated 02.08.2019 addressed to the petitioner, wherein the 50 MW project installation has been approved. Wherefore, there is no prudent or justifiable reason for the petitioners to have imported such modules from China when the same were available in India without the attraction of 25% safeguard duty; hence, the claim of the petitioners to compensate such safeguard duty is not sustainable on facts and in law. The said letter dated 02.08.2019 and a brochure of products of M/s Emmvee Photovoltaic Power Private Limited are produced as Annexure-R2 & R3 respectively.
- d) The report of Chief Electrical Inspector to Government of Karnataka dated 02.08.2019 (Annexure-R2) shows that the petitioner has installed modules for a capacity of 70.98 MW as against the approved 50 MW. Wherefore, without prejudice to the other submission of this statement of objection, it is

submitted that the petitioner is not entitled to any compensation for the additional modules imported by the petitioner to the extent of 20.98 MW.

- e) The Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.210 of 2017 in *Adani Power Limited Vs. CERC and Others* passed a judgment dated 13.04.2018 in which they held that since the PPA had no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The same position was reiterated by the Hon'ble ATE in a judgment dated 14.08.2018 in Appeal No.111 of 2017 in *M/s GMR Warora Energy Limited Vs. CERC and Others*.
8. The petitioners filed the rejoinders in each case reiterating the contents of petition and denying the contentions raised by the respondents in their statement of objections. Further explained that how imposition of safeguard duty is a change in law event, with reference to the relevant Articles of PPA, RfP document and contents of the letters of Karnataka Renewable Energy Development Limited (KREDL), Ministry of New & Renewable Energy (MNRE), Bidding Guidelines. The petitioners relied on the following Rulings:
- (i) *AIR 2008 Pat 5 - Niloufer Siddiqui & Another Vs. Indian Oil Corporation.*
 - (ii) *(2015) 16 SCC 125 - Indian Oil Corporation Limited Vs. Niloufer Siddiqui & Others.*
 - (iii) *AIR 2005 Ker 14 - Mundakayan Sadasivam Vs. Greater Cochin Development Authority.*
 - (iv) *19/MP/2019 & 46/MP/2019 - ACME Jaipur Solar Power Private Limited Vs. MPPMCL.*
 - (v) *(2006) 5 SCC 558 - Anil Rishi Vs. Gurbaksh Singh.*

- (vi) *OP Nos.98-103/2018 - Acme Guledagudda Solar Energy Private Limited Vs. BESCO.*
- (vii) *(2003) 12 SCC 160 - Shyam Singh Vs. Daryao Singh & Others.*
- (viii) *(2011) 8 SCC 161 - Indian Council for Enviro-Legal Action Vs. Union of India.*
- (ix) *Appeal Nos.150, 166, 168, 172, 173 of 2011 and 9, 18, 26, 29 & 38 of 2012 - SLS Power Limited Vs. Andhra Pradesh Electricity Regulatory Commission.*
- (x) *(2015) 12 SCC 611 - Hindustan Zinc Limited Vs. RERC.*
- (xi) *(1979) 3 SCC 489 - Ramana Dayaram Shetty Vs. International Airport Authority of India.*

9. The learned Counsels for the respondents in OP No.48 of 2019, 50 of 2019 and 51 of 2019 filed additional objections contending as under: -

- a) The petitioners have given a table of invoices and details of safeguard duty and IGST paid as well as details of bills of entries and challans in para 10 of the petitions. On verification of the same with annexure produced as P7, it is found that table does not reflect details contained in the documents. Therefore, computation of impact is incorrect. Hence, granting any relief based on the same does not arise. For example, with respect to invoice number Fortum Solar India Private Limited (Sl. No.6 of the table at para 10 of the petition), total challan amount does not correlate with the challan produced at page 349. Further, IGST paid on safeguard duty does not co-relate with IGST amount mentioned in the bill of entries. The IGST amount mentioned in the table is more than what is paid according to the bills of entries and challans produced. Therefore,

claim for amounts based on these invoices is an attempt to unjustly enrich itself.

- b) It is to be noted that the petitioners are in breach of the obligations under the PPAs as who have failed to adhere to the requirement of Article 5.1 which requires the developer to take prudent decisions and adopt best industrial practices. In spite of such a requirement, the petitioners have indulged in import of material from countries which attract higher duty in the form of safeguard duty and consequently trying to pass on the burden to the power utilities which will in turn result in passing on further burden on consumers of Karnataka. The petitioners having acted contrary to the public interest is not entitled to reliefs claimed.
- c) It is also to be noted that the validity of levy if safeguard duty is itself challenged in a writ petition pending before the Hon'ble High Court of Orissa in WP No.12817 of 2018 and interim orders passed in the said proceedings is challenged in SLP No.24009 of 2018 pending before the Hon'ble Supreme Court of India is also pending. Having regard to the fact that they levy itself is challenged and same is the subject matter of the proceedings pending before the Hon'ble Supreme Court, the question of considering and granting the relief sought in the present proceedings does not arise at present.
- d) Therefore, the respondents prayed that the present petitions are bereft of merits and are liable to be rejected with cost.

10. We have heard the learned Counsels for the parties. The petitioners and respondents have filed written arguments. We have perused the contents of various court rulings mentioned in above paras and observed that facts of these cases are not similar to these petitions and are not applicable.
11. From the above pleadings, and rival contentions raised by the parties, the following issues arise for our consideration:
12. **Issue No.1:** Whether it would be necessary for this Commission not to proceed with the present petitions till the disposal of the SLP No.24009-24010/2018 pending before the Hon'ble Supreme Court of India?
13. **Issue No.2:** Whether the petitioners prove that the imposition of Safeguard Duty Notification No.01/2018 Custom-(SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, on import of Solar Modules amounts to 'Change in Law' as per Article 15 of PPA?
14. **Issue No.3:** Whether the respondents (BESCOM, HESCOM, CHESCOM, MESCOM) are liable to reimburse the petitioners for the actual additional expenditure incurred by them as set out in paragraph 10 and 26 of the petitions along with carrying cost from the date of incurring expenses to the date of actual payment?
15. **Issue No.4:** Whether the respondents prove that the petitioners have imported excess Solar Modules and claim is excessive?
16. **Issue No.5:** Whether the petitioners are entitled for appropriate and proportionate increase in tariff due to imposition of safeguard duty and consequently amend tariff specified in the PPAs, dated 24.07.2018, 25.07.2018 and 27.07.2018?

17. **Issue No.6:** What order?

18. **Issue No.1:** Whether it would be necessary for this Commission not to proceed with the present petitions till the disposal of the SLP No.24009-24010/2018 pending before the Hon'ble Supreme Court of India?

a) The respondents have contended that the decision on the validity of the Safeguard Duty Notification No.01/2018- Customs (SG) dated 30.07.2018, is pending before the Hon'ble Supreme Court of India in SLP(C) No.24009-24010/2018 filed by the Government of India, in case of Union of India vs. ACME Solar Holdings Limited. This fact is not denied by the petitioners. The respondents have relied upon the decision cited in D.K. Trivedi & Sons and Others Vs. State of Gujarat and Others (1986) Supp SCC 20 to contend that when the same or similar matters are pending before a superior court, the lower court ought to stay the hearing of the matter until the superior court disposes of the matter. Further, the respondents filed a Memo dated 3.9.2020 wherein they have contended that the stay order issued by the Hon'ble High Court of Orissa in WP (C) No.12817/2018 on IA No.10566/2018 staying the operation of the Safeguard Duty Notification dated 30.07.2018, was challenged before the Hon'ble Supreme Court and the Hon'ble Supreme Court stayed the interim order dated 23.07.2018 in IA No.10566/2018 passed by the Hon'ble High Court of Orissa and the further proceedings in WP (C) No.12817/2018 was also stayed.

- b) In the decision of D.K. Trivedi & Sons and Others Vs. State of Gujarat and Others (1986) Supp SCC 20 at Paragraph 83, the Hon'ble Supreme Court has stated as follows:

“Civil Appeals 1525 and 1526 of 1982 are directed against the order of the Gujarat High Court dismissing the writ petitions filed by the appellants challenging the constitutionality of Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, and the validity of Notification No.GU-81/75/MCR 2181/ (168)-4536-CHH dated June 18, 1981, and directing the appellants to approach the Supreme Court as similar matters were pending there. In our opinion, the course adopted by the High Court was not correct. If the High Court thought that the point raised by the appellants was the same as was pending in this Court, it ought to have stayed the hearing of the writ petitions until this Court disposed of the other matters. As we have, however, held Section 15 and the amendments made by the said notification dated June 18, 1981, to be valid and constitutional, both these appeals are, therefore, dismissed.”

- c) The petitioners placed reliance on the decision of Hon'ble Supreme Court in the case of Atma Ram properties (P) Limited vs. Federal Motors(P) Limited reported in (2005)1 SCC 705 and Madan Kumar Singh vs. District Magistrate, Sultanpur reported in (2009) 9 SCC 79 which confirm that mere pendency of a matter before a superior court, does not appear as stay of the lower court's proceedings. Moreover, the Hon'ble Supreme Court has not stayed and/ or issued

any orders which preclude this Commission from disposing of the present petitions. The same has also been admitted by the Counsels for respondents.

d) On consideration of the Paragraph 83 of the decision rendered by the Hon'ble Supreme Court in D.K. Trivedi & Sons and Others Vs. State of Gujarat and Others (1986) Supp SCC 20, we are of the considered opinion that the staying of the present proceedings, till the disposal of SLP (C) Nos.24009-24010/2018 before the Hon'ble Supreme Court, is not necessary for the following reasons:

(i) The perusal of Paragraph 83 of the above said Hon'ble Supreme Court decision would show that the constitutional validity of Section 15 of the Mines & Minerals (Regulation & Development) Act, 1957 and the validity of Notification issued under the said Section 15 were under challenge before the Hon'ble High Court of Gujarat in two Writ Petitions. It appears as the same question was already pending before the Hon'ble Supreme Court, the Hon'ble High Court of Gujarat directed the writ petitioners to approach the Hon'ble Supreme Court dismissing the writ petitions. As against the dismissal of the writ petitions, civil appeals were filed before the Hon'ble Supreme Court. In such circumstances, the Hon'ble Supreme Court has observed that the course adopted by the Hon'ble High Court was not correct and if the Hon'ble High Court thought that the point raised by the appellants was the same as was pending in this Court, it ought to have stayed the hearing of the writ petitions till this Court disposed of the said matter.

- (ii) In the present proceedings before us, the validity of the Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India is not in dispute or it cannot be disputed before this Commission.
- (iii) The learned Counsel for the petitioners has relied on the judgment reported in (2005) 1 SCC 705 Atma Ram Properties (P) Limited Vs. Federal Motors (P) Limited, wherein the Hon'ble Supreme Court held as under: -

"It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate court and the appellate court has discretion to grant an order of stay or to refuse the same. The only guiding factor, indicated in Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate court would be inclined to pass an order of stay. Experience shows that the principal consideration which prevails with the appellate court is that in spite of the appeal having been entertained for hearing by the appellate court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having

succeeded from the court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum. Still the question which the court dealing with a prayer for the grant of stay asks itself is: why the status quo prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted."

- e) The learned Counsel for petitioners contended that respondents have relied upon the judgment of the Hon'ble Supreme Court in case of D.K. Trivedi & Sons and Others vs. State of Gujarat & Others, when same /similar matters are being before a superior court, the lower court ought to stay the hearing of the matter until the superior court disposes off the matter. He submits that the ratio in the D.K. Trivedi case is totally inapplicable to the present petitions. In the D.K. Trivedi case, the Hon'ble Supreme Court has clarified that an objection can only be raised if a party raises the 'same' point before the lower court and superior forum. Moreover, the Fortum Solar India Limited is not a party before the Hon'ble Supreme Court nor has it challenged the safeguard duty notification before any forum. The petitioner is approaching this Commission by way of the present petitions after having incurred the expenditure towards the Safeguard Duty.

- f) The learned Counsels for the petitioners further relied on the judgment reported in (2009) 9 SCC 79 Madan Kumar Singh (Dead) through LRs Vs. District Magistrate, Sultanpur & Others, wherein the Hon'ble Supreme Court at para 14 held as under: -

“It is trite to say that mere filing of a petition, appeal or suit, would by itself not operate as stay until specific prayer in this regard is made and orders thereon are passed. There is nothing on record to show that any stay was granted in favour of any party, restraining the respondents not to deliver the papers of the truck to the appellant. It would go to show that the respondents were unlawfully holding back the papers with them, for which, otherwise they were not entitled to do so.”

- g) There are other issues involved in these petitions, which require detail hearing and examination for consideration of prayers made by the petitioners. If these proceedings are stayed awaiting the decision of the Hon'ble Supreme Court on the validity of the safeguard duty notification dated 30.07.2018, the hearing of these proceedings would be unnecessarily delayed. In the event of the Hon'ble Supreme Court, holding invalidity of the said Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.07.2018 issued by the Government of India, then the petitioners would not be entitled to any relief prayed for in the present proceedings.

h) It may be noted that the Hon'ble Supreme Court has not issued any specific or general direction to this Commission, not to proceed to hear the claims for reimbursement of safeguard duty made by the petitioners in the event of Change in Law due to safeguard duty notification dated 30.07.2018 issued by the Government of India. In view of above facts, we are of the view/opinion that it would not be appropriate to stop the hearing/proceedings of these petitions.

i) It is pertinent to mention here that the learned Counsels for the respondents have not objected to the undertaking given by the petitioners stating that they will reimburse the safeguard duty amount received from the respondents, in the event of the Hon'ble Supreme Court setting aside the Safeguard Duty Notification dated 30.07.2018.

j) Therefore, Issue No.1 is held in negative.

19. **Issue No.2:** Whether the petitioners prove that the imposition of Safeguard Duty Notification No.01/2018 Custom-(SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, on import of solar modules amounts to 'Change in Law' as per Article 15 of PPA?

a) It is not in dispute that the petitioners have entered into Power Purchase Agreements on 24.07.2018; 25.07.2018 and 27.07.2018, with the respondents to setup Solar Power Projects at Pavagada in Karnataka State. Solar power projects are commissioned within the schedule

commissioning period/date. Now, the petitioners sought from this Commission to declare, acknowledge and hold that the imposition of Safeguard Duty on import of solar modules/cells on the basis of Safeguard Duty Notification No.01/2018- customs (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, under Article 15 of PPA, as a "Change in Law" event. The reliance placed by the Petitioners is on the orders passed by the Hon'ble Maharashtra Electricity Regulatory Commission, in Case Nos.276, 325 and 340 of 2018 and Case Nos.123-124 of 2019, wherein, the imposition of safeguard duty is allowed as "Change in Law" under the PPA. Therefore, the petitioners have sought for a similar type of relief as provided under the existing Article 15.2.1 of PPAs.

- b) Further, petitioners have placed reliance on order dated 2.5.2019 in petition Nos.342 and 343/MP/2018 passed by the Hon'ble Central Electricity Regulatory Commission in case of ACME Rewa Solar Energy Private Limited vs. Solar Energy Corporation of India, wherein, it held that "the imposition of the safeguard duty vide Notification No.1/2018(SG) dated 30.7.2018 is covered and classified as "Change in Law" event under the provisions of PPA." To counter this argument, Counsels for respondents submitted that the prayers urged by the petitioners in these petitions would be additional burden foisted upon the respondents for seeking the imposition of safeguard duty vide notification No.01/2018-Customs(SG) dated 30.7.2018 by the Government of India, to be declared as an event constituting a " Change in Law" under Article 15 of the Power Purchase

Agreement(PPA) and also seeking from this Commission to determine the appropriate and proportionate increase in tariff and carrying costs as well. The petitioners are not entitled for any relief of change in law under Article 15 of PPA as the grievances of the petitioners are based on facts and circumstances that could have easily been avoided by the petitioners. The petitioners could have imported solar modules/cell from the developing countries except China and Malaysia, which were notified on 05.02.2016 vide Notification No.19/2016 by the Government of India, where there is no safeguard duty leviable on import of Solar cells whether assembled or not assembled in modules or panels. The petitioners were in full cognisance of the contents of the safeguard duty notifications and exemptions on the levy of safeguard duty on solar panels imported from developing countries and proceeded to import solar panels from China knowing the same will attract the levy and placed purchase orders, i.e., three to five months after the safeguard duty notification was issued. It was entirely possible for the petitioners to avoid the payment for safeguard duty by importing the solar panels/cells from countries notified as developing countries, in which event the safeguard duty would not be levied and no change in law event would have occurred. The respondents further contend that the petitioners are seeking the benefit of change of law despite wilfully attracting the levy of safeguard duty in spite of knowing the contents of the notification and then seeking to pass

on the burden of the same to the respondents herein who were not consulted prior to such a decision being made.

- c) It is contended that the solar modules of Tata Power Solar and Adani Solar Modules are more economical at the rate of Rs.20 per watt and Indian manufacture of solar modules would also be eligible for a Government subsidy on the same, which would make more economical than those are purchased from China. From the quality perspective, top Indian brands manufacturing solar panels rival those manufactured internationally are good and more competitive from the cost perspective, even without the imposition of safeguard duty. The safeguard duty is levied on the foreign products, primarily during periods of import surge in order to protect the domestic solar manufacturers and not to encourage the purchase of products from the foreign entities. The petitioners are in full cognisance of this fact and have chosen to disregard the contents of the safeguard duty notification, by wilfully entering into an agreement for the import of solar modules from a Chinese firm after coming into effect of the safeguard duty notification issued by the Government of India. The claims for reimbursement of safeguard duty from the respondents would be a burden on the finances of the power distribution companies which are public undertakings owned by the state government. Therefore, commission may not consider to declare the Safeguard Duty Notification No.01/2018-Customs (SG) issued by the Government of India as "Change in Law" event under the PPA.

- d) Per contra, the petitioners contended that there is no bar under the PPA on import of solar modules, in fact Article 15.1.1(e) of PPA provides that any change in law pertaining to taxes, duties and cess after the date of submission of Techno Commercial Bid shall be to the account of the ESCOM and appropriate change in tariff, either increase or decrease in proportionate, due to the change in taxes, duties and cess shall be as per clause 15.2 (Relief for change in Law) of PPA. Moreover, this is a commercial decision of the petitioners to import solar modules/cell from China and the respondents cannot impose conditions that petitioners could have purchased solar modules/ cell from domestic manufacturers and avoided the attraction of safeguard duty on import of solar module/ cell from China. Therefore, the petitioners are seeking the Commission to declare, acknowledge and hold that the imposition of Safeguard Duty vide Notification dated 30.07.2018 as a change in law event as per PPA paras with effect from 30.07.2018.
- e) On the basis of examination of written submission/ statement of objections and rejoinders submitted by the parties, we proceed to examine as to whether the Safeguard Duty Notification No.01/2018-customs (SG) dated 30.07.2018 issued by the Ministry of Finance, Government of India, imposing the safeguard duty on imported solar cells, whether or not assembled in modules or panels, is covered under the scope of 'Change in Law' event or otherwise under the provisions of PPAs of the solar projects. Whether to consider the prayers made by the petitioners on the

basis of averments in these petitions, we proceed to examine the various definitions and relevant clauses/articles under the PPAs of petitioners, the Guidelines, Notifications and rulings of various authority and Superior Courts.

- f) The terms “Law” and “Government Instrumentality” are defined under definitions clause of Article 21.1 of the aforesaid PPAs as here under:

“Government Instrumentality” means any department, division or sub-division of the Government of India or the State Government and includes any commission board, authority, agency or municipal and other local authority or statutory body including panchayat under the control of Government of India or the State Government, as case may be, and having jurisdiction over all or any part of the project facilities or the performance of all or any of the services or obligations of the developer under or pursuant to this Agreement.”

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

g) Article 15.1.1 of PPA, defines the term 'Change in Law' means the occurrence of any of the following events after the submission of online Techno Commercial Bid resulting into any additional recurring/non-recurring expenditure by the solar power developer or any income to the developer. The sub-clauses of Article 15.1 read as under:

- a) The enactment coming into effect, adoption, promulgation, modification Regulation framed pursuant to such Law;
- b) A change in the interpretation or application of any law by Indian Government Instrumentality having legal power to interpret or apply such Law.
- c) -----
- d) -----
- e) Any change in the rates of tax duties, and cess or introduction of any taxes cess and duties made applicable for setting up of the project and supply of power by the developer as per the terms of agreement----- any change in law pertaining to taxes, duties and cess after the date of submission of Technical Bid shall be to the account of the ESCOM and appropriate change in tariff, either increase in proportionate, due to change in taxes, duties and cess shall be as per clause 15.2(Relief for change in Law) of PPA.

Article 15.2 stipulates relief for 'Change in Law' and Article 15.2.1 stipulates that the aggrieved party shall be required to approach to KERC for seeking approval of 'Change in Law'. Further, Article 15.2.2 states that

the decision of the State Commission, to acknowledge a 'Change in Law' and the date from which it will become effective and to provide relief for the same, shall be final and governing on both the parties.

h) The learned Counsel for the petitioners relied on the following Judgment and Orders to support their claim that, notification dated 30.07.2018 issued by the Ministry of Finance imposing safeguard duty is a 'Change in law' event.

- (i) Case No. 276 of 2018 & Batch – Tata Power Renewable Energy Limited Vs. MSEDCL & Batch.
- (ii) Case No. 47 of 2019 – M/s. Azure Power India Private Limited Vs. MSEDCL & Another.
- (iii) Petition No.342/MP/2018 & Batch – ACME Rewa Solar Energy Private Limited Vs. SECI & Others & Batch.
- (iv) Case No.123 of 2019 & Batch – M/s Juniper Green Energy Private Limited Vs. MSEDCL & Batch.
- (v) O.P. Nos. 98-103/2018 – ACME Guledagudda Solar Energy Private Limited Vs. BESCO & Batch.
- (vi) Petition Nos. 14/MP/2019 & Batch – Renew Solar Power Private Limited Vs. SECI & Batch.
- (vii) Petition No.19/MP/2019 & Batch – ACME Jaipur Solar Power Private Limited Vs. MPPMCL & Others & Batch.
- (viii) Case No. 228 of 2019 – Adani Renewable Energy (RJ) Limited Vs. MSEDCL.
- (ix) Case No. 259 of 2019 – Azure Power Thirty-Four Private Limited Vs. MSEDCL.
- (x) Case No.166 of 2019 - Tata Power Renewable Energy Limited Vs. MSEDCL.
- (xi) Petition No.356/MP/2018 & Batch - Azure Power Thirty-Four Private Limited Vs. SECI & Another & Batch.
- (xii) Petition No.176/MP/2019 – Solairepro Urja Private Limited Vs. NTPC & Others.
- (xiii) Petition No.373/MP/2020 along with IA 27/2020 - ACME Jaipur Solar Power Private Limited Vs. MPPMCL & Others.

(xiv) *Case No. 7 of 2020 - ACME Chittorgarh Solar Energy Private Limited Vs. MSEDCL.*

- i) The Commission notes that, no record is placed by the respondents which could show that they have denied to recognise the imposition of safeguard duty notification as a 'Change in Law' event. The Commission, further notes that Article 15.2.1 of the PPA, stipulates that the aggrieved party shall be required to approach the KERC for seeking approval of change in law. This Commission perused the contents of the above-mentioned decisions, which recognised the imposition of safeguard duty notification dated 30.7.2018 issued by the Government of India as "Change in Law" event.
- j) We have gone through the proceedings of the Directorate General of Trade Remedies dated 16.7.2018, a copy of the proceedings which was submitted on 06.06.2020 by the Advocate for petitioners by way of additional affidavit at Annexure- P/9, wherein the Director General (Safeguard) has conducted proceedings under the Customs Tariff Act,1975 and the Customs Tariff(Identification and Assessment of Safeguard Duty) Rules,1997 and recorded his findings and recommended the imposition of safeguard duty on import of solar modules from China PR and Malaysia. The extract of recommendation is produced below: -

Para 76 *"The increase imports of Product Under Consideration "PUC" into India, have caused serious injury and threaten to cause serious injury to the domestic products of "PUC" and it will be in the public interest to*

impose safeguard duty on imports of "PUC" into India in terms of Rules 12 of the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 for a period of two years. Considering the average cost of production of "PUC" of the domestic producers after allowing the reasonable return on cost of production minus interest, safeguard duty as indicated below which is considered to be adequate to protect the interest of domestic industry on PUC being imported falling under sub-heading 8541 4011 of the First Schedule of the Customs Tariff act, 1975, is recommended to be imposed. The Item mentioned herein is indicative only and the description of the imported goods will determine the applicability of the recommended Safeguard Duty."

Year	Safeguard Duty Recommended
First Year	Safeguard Duty @25% ad valorem
Second Year (For first 6 months)	Safeguard Duty @20% ad valorem
Second Year (for next 6 months)	Safeguard Duty @15% ad valorem

The Commission notes that on the basis of final findings of DGRT in F.No.22.1.2018 dated 16.7.2018 and as per his recommendations, the safeguard duty was levied on import of "solar cells whether or not assembled in modules or panels" from China PR and Malaysia. Accordingly, the Ministry of Finance, Government of India has issued the Safeguard Duty Notification No.01/2018- Customs (SG) dated 30.7.2018.

k) The Commission notes that any event can be said to be a 'Change in Law' event only, if it satisfies the provisions as stipulated under the PPA. In the instant case(s), the terms "Law" and "Government Instrumentality" are defined under Article 21.1 of PPA and "Change in Law" has also been defined under Article 15 of the PPA. The definition of "Law" under the PPA is an inclusive definition and contemplates all laws applicable in India in various forms. However, for an event to be considered as "Change in Law event" requires that to be caused by the operation of law by an Indian Government Instrumentality. The term "Indian Government Instrumentality" covers Government of India, any Ministry, Government of Karnataka, Inspectorate, Department, Commission, Body, Authority, Agency, Municipal and Local Authority or Statutory Body. The 'Change in Law' encompasses introduction of any law after last date of Bid Submission which may affect the project cost of the solar power developer. Under the provisions of PPAs, an event arising from the actions of any authority is covered within the definition of "Indian Government Instrumentality" would satisfy the requirement of 'Change in Law'. The "Indian Government Instrumentality" as defined under the PPA includes any Ministry of the Government of India. The Ministry of Finance, being a Central Ministry under the Government of India is satisfying the requirement of an "Indian Government Instrumentality" under clause 21.1 of PPAs. Further, as per clause 15.1.1. (e) of the PPAs, "Notification of new law or amendment of existing law or introduction/change in tax, duty after

the date of submission of Techno Commercial Bid qualifies as 'Change in Law' event. In the instant case(s), the Safeguard Duty Notification vide No.01/2018-Customs (SG) dated 30.7.2018 issued by the Ministry of Finance, Government of India is subsequent, to the last date of submission of bids by the petitioners.

- l) It could be seen from the available records that petitioners have participated in Competitive bidding for the aforesaid solar power projects and KREDL has accepted their bids and PPAs of all five solar power projects were entered with respondents on 24.07.2018;25.7.2018 and 27.7.2018 earlier to the Safeguard Duty Notification vide No.01/2018-Customs (SG) dated 30.7.2018 issued by the Ministry of Finance, Government of India. Article 15.1.1(e) of aforesaid PPA clearly provides that any change in law pertaining to taxes, duties and cess after the dates of submission of the Techno Commercial Bid shall be to the account of the ESCOMs and appropriate change in tariff, either increase or decrease in proportionate, due to the change in taxes, duties and cess shall be as per clause 15.2 (Relief of Change in Law) of PPA. In the instant case, the safeguard duty levied on import of solar cells whether or not assembled in modules or panels falls under the category of duty as envisaged under the clause 15.1.1 (e) of PPA. This Commission relied on the order dated 14.08.2018 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 111 of 2017 in GMR Warora Energy Limited vs. Central Electricity

Regulatory Commission and Others, wherein it is held that any tax levied through an Act of Parliament after cut-off date which results in additional expenditure by the petitioner, same is covered as "Change in law." In the same judgement, it is held that any tax or application of new tax on 'supply of power' covers the taxes on inputs required for such generation and supply of power to the distribution licensees. In the instant case, solar modules/cell are essential items to set up a generating station in order to supply power to the respondent as per terms of PPA. The imposition of safeguard duty on imported solar modules/cells from China by the Government of India has resulted in the change in cost of inputs required for generation and hence the same is to be considered as" Change in Law"

- m) We have perused the Judgments and Orders of the Hon'ble Supreme Court, Hon'ble Appellate Tribunal for Electricity, Hon'ble Central Electricity Regulatory Commission and other State Electricity Regulatory Commissions submitted by both the parties.
- n) This Commission relied upon the order dated 14.8.2018 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 111 of 2017 in GMR Warora Energy Limited Vs. Central Electricity Regulatory Commission and Others, wherein it is held that any tax levied through an Act of Parliament after cut-off date which results in additional expenditure by the petitioner, same is covered as "Change in law." In the same judgement, it is held that

any tax or application of new tax on 'supply of power' covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees. In the instant case, solar modules/cell are essential items to set up a generating station in order to supply power to the respondents as per terms of PPAs. The impose of safeguard duty on imported solar modules/cells from China by the Government of India has resulted in the change in cost of inputs required for generation and hence the same is to be considered as" Change in Law"

o) This Commission has also held in O.P. Nos. 98-103 /2018 in case of ACME Guledagudda Solar Energy Private Limited Vs. BESCO & Others that "the Safeguard Duty Notification No.01/2018-Customs (SG), dated 30.7.2018 issued by the Ministry of Finance, Government of India, imposing Safeguard Duty qualifies as a Change in Law event."

p) The contention of respondents that, import of solar modules/ cells by the petitioners from China and safeguard duty claims on such solar modules procured by the petitioner cannot be treated as change in law event, does not hold valid ground, and not to declare and hold that safeguard duty notification dated 30.07.2018, on such import of cells as change in law event.

q) Keeping in view of definitions of 'Government Instrumentality', "Law", provisions of Article 15.1.1(e) of PPA and various rulings of Higher Courts/ Appellate Tribunal for Electricity, the Commission is of the view that the

Safeguard Duty Notification No.01/2018-Customs(SG) dated 30.7.2018 imposing Safeguard Duty on import of "Solar Cells, whether or not assembled in modules or panels" from China PR and Malaysia is covered as an event of 'Change in Law' under the provisions Article 15 of the PPAs. Therefore, contention of the respondents has no force and is liable to be rejected.

- r) Therefore, we hold that Safeguard Duty Notification No.1/2018-Customs (SG)dated 30.7.2018 issued by the Ministry of Finance, Government of India, imposition of safeguard duty on import of solar cells/ panels modules is an event of 'Change in law' in terms of Article 15 of the aforesaid PPA of the petitioners.
- s) The Learned Counsels for respondents contended that the Safeguard Duty Notification No01/2018-Customs (SG), dated 30.7.2018 envisages that twenty-five per cent, ad valorem minus anti-dumping duty is payable, if any, but in the instant case(s), the petitioners have not deducted any anti- dumping duty from the claims made for reimbursement of safeguard duty, therefore, their claims shall not be considered. While submitting written arguments by the petitioners, it is stated that there was no anti-dumping duty payable on import of solar modules/cells from the China on the date of the imports of solar modules. Therefore, the question of deducting anti- dumping or any other duty on import of solar module does not arise. It may be noted that Learned Counsels for respondents have failed to substantiate that there was an anti-dumping duty levied on solar

modules, before issuance of the safeguard duty notification dated 30.7.2018. The Commission has gone through the relevant provisions of the First Schedule to the Customs Tariff Act, 1975 and observed that Chapter-85, Section-XVI, Tariff Item- heading 8541 4011- Solar cells whether or not assembled in modules or panels are shown as "free" so it is presumed that there was no anti- dumping duty levied on solar modules.

t) Hence, our answer on Issue No.2 is in the affirmative and we hold that the Safeguard Duty Notification No.01/2018-Customs SG) dated 30.7.2018 issued by the Ministry of Finance, Government of India, is a "Change in Law" under Article 15.1 of the PPA entered into by the petitioners and respondents.

20. **Issue No.3:** Whether the Respondents (BESCOM, HESCOM, CHESCOM, MESCOM) are liable to reimburse the Petitioners for the actual additional expenditure incurred by it as set out in paragraph 10 and 26 of the petitions along with carrying cost from the date of incurring expenses to the date of actual payment?

21. a) The learned counsel for petitioners contended that the petitioners are seeking reimbursement of safeguard duty paid/remitted by them to Customs Department, while importing solar modules/ cells/ panel from China on account of safeguard duty levied by Safeguard Duty Notification No.01/2018- Customs (SG) dated 30.7.2018 issued by the Government of India along with carrying cost from the date of incurring expenses to the date of actual payment. The petitioners have incurred

additional expenditure on account of change in law event and prayed for reimbursement of additional expenditure along with interest on additional working capital deployed for its solar project as envisaged under Article 15.1 and 15.2 of the PPA.

b) Article 20.1 of the PPA provides that interest rate of prevailing medium term SBI PLR would be payable on 'any sum 'which becomes due under the PPA. The scope of Article 20.1 of the PPA which is a miscellaneous provision, is very wider. In terms of Article 15.1.1(e) and article 15.2 of the PPA read with other Article 20.1 of the PPA, the petitioner would be entitled for interest on the compensation which becomes payable by the respective ESCOMs under the PPA. Further, in terms of Article 15.2.2 of the PPA, the decision of this Commission to acknowledge Change in law, the date from when it would be effective, and relief shall be final and governing on both the parties.

c) The learned Counsel for petitioners contended that the Hon'ble Supreme Court of India in a catena of judgments has held that award of interest is an integral part of implementing concepts of the time and value of money. One such judgment is the case of Indian Council for Enviro-Legal Action vs. Union of India reported as (2011) 8 SCC 161, wherein, the Hon'ble Supreme Court held that the courts are empowered to do complete justice and grant interest to implement practical terms such as time value of money.

- d) The Hon'ble Supreme Court in the case of South Eastern Coalfields Limited vs. State of Madhya Pradesh reported in (2003) 8 SCC has held that even in the absence of any stipulation under the agreement, interest can be granted on equitable terms, subject to there being no stipulation under the agreement to the contrary. The petitioner till date has funded the carrying cost of substantial amount expended by it due to imposition of safeguard duty from its working capital which is serviced along with interest on working capital. Hence, petitioner is seeking reimbursement of carrying cost /interest which has been actually incurred by it.
- e) The Hon'ble Appellate Tribunal for Electricity (ATE) in its order dated 20.12.2012 in case of SLS Power Limited vs. Andhra Pradesh Electricity Regulatory Commission in Appeal No.150 of 2011 & Batch, has held that awarding carrying cost was well established through the various judgments passed by it. The Hon'ble ATE held that the carrying cost is compensation for value of money or money denied at the appropriate time and paid after a lapse. The developers were entitled to carrying costs on the differential amount due to them as a result of re-determination of tariff.
- f) Further, there is no prohibition under the PPA from granting carrying costs. The Hon'ble Supreme Court in its Judgment in the case of Shyam Singh vs. Daryao Singh & Others, reported in (2003) 12 SCC 160, while interpreting a contract held that unless there is express prohibition, the same is deemed

to be permitted. Therefore, in the present case as well, since there are no stipulations or express prohibitions in the PPA prohibiting the grant of carrying cost, it should be deemed that the provision of relief as stipulated under Article 15.2 of the PPA includes the component of carrying costs.

22. Petitioners submitted that they had placed the orders for purchase of solar modules from the Vendor namely Wuxi Suntech Power Company Limited and Jinko Solar Company Limited (based in China) and received all the Solar Panels at Chennai Port during the period January 2019 and May 2019, thereby attracting the imposition of safeguard duty at the rate of 25% of the value of solar modules and petitioners have incurred additional cost due to the introduction of/imposition of safeguard duty for which it must be compensated along with the carrying cost for the period starting from the date on which it has incurred the additional cost to the date of actual reimbursement by ESCOM. It is not in dispute that the Government of India issued Safeguard Duty Notification dated 30.07.2018. The said Notification Introduced Safeguard Duty at the following rates on the import of solar cell (whether or not assemble in modules or panels) from certain countries including China.

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%

23. The petitioners in this regard, in their petitions at para 10 has given details of impact of imposition of Safeguard Duty in different cases is as detailed below:

OP No. 48 of 2019.

(Amount in Rupees)

Sl. No.	Invoice No.	BOE No. & Date	Safeguard Duty @ 25% paid	IGST Paid on SGD paid	Total impact on a/c of SGD + IGST	Total Challan Amount* (in Rupees)	Payment Confirmation No. & Date
1	Fortum 2019-0010	2226684 Dt.30.01.2019	1,62,24,849	8,11,242.43	1,70,36,091	2,02,81,060.80	204552272 Dt.01.03.2019
2	Fortum 2019-0030	2318152 Dt.20.02.2019	1,23,61,789	6,18,089.47	1,29,79,879	1,54,52,237.00	206045240 Dt.11.03.2019
3	Fortum 2019-0040	2375008 Dt.26.02.2019	99,04,455	4,95,222.73	1,03,99,677	1,23,80,568.00	206538428 Dt.14.03.2019
4	Fortum 2019-0020	2412885 Dt.28.02.2019	1,21,90,098	6,09,504.90	1,27,99,603	1,52,37,622.00	206538428 Dt.16.03.2019
5	Fortum 2019-0050	2375018 Dt.26.02.2019	1,21,90,098	6,09,504.90	1,27,99,603	1,52,37,622.00	206538428 Dt.14.03.2019
6	Fortum 2019-0060	2375017 Dt.26.02.2019	1,21,90,098	6,09,504.90	1,27,99,603	1,52,43,884.00	206879638 Dt.14.03.2019
7	Fortum 2019-0070	2412658 Dt.28.02.2019	1,21,90,098	6,09,504.90	1,27,99,603	1,52,43,884.00	206879638 Dt.16.03.2019
8	Fortum 2019-0080	2412657 Dt.28.02.2019	99,04,455	4,95,222.73	1,03,99,677	1,23,85,656.00	206879638 Dt.16.03.2019
9	Fortum 2019-0090	2375084 Dt.26.02.2019	2,43,80,196	12,19,009.79	2,55,99,206	3,04,75,245.00	206538828 Dt.14.03.2019
10	Fortum 2019-0110	2512115 Dt.05.03.2019	1,87,78,760	9,38,938.00	1,97,17,698	2,34,73,450.00	20765729 Dt.22.02.2019
11	Fortum 2019-0140	2512130 Dt.05.03.2019	1,12,67,256	5,63,362.80	1,18,30,619	1,40,84,070.00	207979525 Dt.25.03.2019
12	Fortum 2019-0290	3188219 Dt.29.04.2019	1,66,31,543	8,31,577.15	1,74,63,120	2,07,89,429.00	215254526 Dt.15.05.2019
13	Fortum 2019-0310	3254239 Dt.02.05.2019	2,26,79,377	11,33,968.84	2,38,13,346	2,83,49,220.90	215549089 Dt.17.05.2019
14	Fortum 2019-0020	3249060 Dt.02.05.2019	1,66,31,543	8,31,577.15	1,74,63,120	2,07,89,428.66	215549089 Dt.17.05.2019
15	Fortum 2019-0330	3254240 Dt.02.05.2019	3,77,98,961	18,89,948.06	3,96,88,909	4,72,48,701.50	215549089 Dt.17.05.2019
16	Fortum 2019-0350	3452069 Dt.15.05.2019	2,12,88,311	10,64,415.53	2,23,52,726	2,66,10,388.16	217360068 Dt.01.06.2019
17	Fortum 2019-0360	3451916 Dt.15.06.2019	76,69,611	3,83,480.57	80,53,092	95,87,014.26	217224667 Dt.31.05.2019
Total impact on account of Safeguard Duty					28,79,95,571		

OP No. 49 of 2019.

(Amount in Rupees)

Sl. No.	Invoice No.	BOE No. & Date	Safeguard Duty @ 25% paid	IGST Paid on Safeguard Duty paid	Total impact on account of Safeguard Duty + IGST	Total Challan Amount* (in Rupees)	Payment Confirmation No. & Date
1	Fortum 2019-0180	2607103 Dt.14.03.2019	3,07,97,166	15,39,858.32	3,23,37,025	3,85,12,278.00	208752510 Dt.30.03.2019
2	Fortum 2019-0190	2791901 Dt.27.03.2019	2,38,47,952	11,92,397.61	2,50,40,350	2,98,46,692.00	211082160 Dt.15.04.2019
3	Fortum 2019-0210	2804587 Dt.27.03.2019	1,49,04,970	7,45,248.50	1,56,50,219	1,86,31,213.00	211082160 Dt.15.04.2019
4	Fortum 2019-0220	2885803 Dt.03.04.2019	2,38,47,952	11,92,397.61	2,50,40,350	2,98,09,960.00	2026725630 Dt.22.04.2019
5	Fortum 2019-0240	2885797 Dt.09.04.2019	3,87,52,922	19,37,646.11	4,06,90,568	4,84,41,153.00	2026725664 Dt.22.04.2019
6	Fortum 2019-0250	2989945 Dt.10.04.2019	1,51,08,854	7,55,442.69	1,58,64,296	1,88,86,067.00	213072117 Dt.30.04.2019
7	Fortum 2019-0260	2989946 Dt.10.04.2019	2,26,63,281	11,33,164.03	2,37,96,445	2,83,52,385.00	212868021 Dt.29.04.2019
8	Fortum 2019-0280	3188214 Dt.29.04.2019	2,49,47,314	12,47,365.72	2,61,94,680	3,11,84,143.00	215254526 Dt.15.05.2019
9	Fortum 2019-0340	3348277 Dt.08.05.2019	4,04,65,009	20,23,250.43	4,24,88,259	5,05,81,260.73	216378376 Dt.24.05.2019
10	Fortum 2019-0370	3452076 Dt.16.05.2019	3,79,62,307	18,98,115.37	3,98,60,423	4,74,52,884.17	217224667 Dt.31.05.2019
11	Fortum 2019-0400	3452019 Dt.15.05.2019	38,17,454	1,90,872.68	40,08,326	47,71,817.05	217224667 Dt.31.05.2019
Total impact on account of Safeguard Duty					29,09,70,940		

OP No. 50 of 2019.

(Amount in Rupees)

Sl. No.	Invoice No.	BOE No.& Date	Safeguard Duty @ 25% paid	IGST Paid on SGD paid	Total impact on a/c of SGD + IGSGT	Total Challan Amount* (in Rs.)	Payment Confirmation No. & Date
1	Fortum 2019-0100	2512113 Dt.06.03.2019	1,87,78,760	9,38,938.00	1,97,17,698	2,34,73,450	207657290 Dt.22.03.2019
2	Fortum 2019-0120	252509 Dt.05.03.2019	1,87,78,760	9,38,938.00	1,97,17,698	2,34,73,450	207657290 Dt.22.03.2019
3	Fortum 2019-0130	2512508 Dt.05.03.2019	1,87,78,760	9,38,938.00	1,97,17,698	2,34,73,450	207979525 Dt.25.03. 2019
4	Fortum 2019-0150	2604540 Dt.14.03.2019	1,87,78,760	9,38,938.00	1,97,17,698	2,34,73,450	208752510 Dt.30.03. 2019
5	Fortum 2019-0160	2604525 Dt.14.03.2019	82,62,654	4,13,132.72	86,75,787	1,03,28,318	208752510 Dt.30.03. 2019
6	Fortum 2019-0170	2606236 Dt.14.03.2019	4,65,71,325	23,28,566.02	4,88,99,891	5,82,38,080	208752510 Dt.30.03. 2019
7	Fortum 2019-0200	2791916 Dt.27.03.2019	3,87,52,922	19,27,646.11	4,06,09,568	4,85,00,875	211082160 Dt.15.04. 2019
8	Fortum 2019-0230	2902283 Dt.04.04.2019	1,51,08,850	7,55,442.69	1,58,64,296	1,88,86,067	212126584 Dt.23.04. 2019
9	Fortum 2019-0270	2066466 Dt.17.04.2019	4,15,49,348	20,77,467.39	4,36,26,815	5,19,36,686	213466789 Dt.03.05. 2019
10	Fortum 2019-0300	3188222 Dt.27.04.2019	4,15,78,857	20,78,942.80	4,36,57,800	5,19,73,572	215389491 Dt.16.05. 2019
11	Fortum 2019-0380	3444468 Dt.15.03.2019	98,06,585	4,90,329.23	1,02,96,914	1,22,58,230.72	217360068 Dt.01.06. 2019
12	Fortum 2019-0390	3444473 Dt.16.03.2019	16,35,098	81,754.91	17,16,853	20,43,872.69	217224667 Dt.31.05. 2019
Total impact on account of Safeguard Duty					29,22,99,717		

OP No. 51 of 2019.

(Amount in Rupees)

Sl. No.	Invoice No.	BOE No.& Date	Safeguard Duty @ 25% paid	IGST Paid on SGD paid	Total impact on a/c of SGD + IGST	Total Challan Amount* (in Rs.)	Payment Confirmation No. & Date
1	Z2019031881	2900891 Dt.04.01.2019	4,07,05,285	20,35,264.23	4,27,40,549	5,08,81,605.72	212126584 Dt.23.04.2019
2	Z2019031882	2900888 Dt.04.04.2019	3,96,66,076	19,83,303.78	4,16,49,379	4,95,82,595.00	212126584 Dt.23.04.2019
3	Z2019031838-1	3082945 Dt.19.04.2019	2,39,91,964	11,99,598.199	2,51,91,562	2,99,89,954.73	214074753 Dt.07.05.2019
4	Z20190041825	3082938 Dt.19.04.2019	1,56,84,237	7,84,211.85	1,64,68,440	1,96,05,296.25	214074753 Dt.07.05.2019
5	Z20190418161	3188211 Dt.29.04.2019	1,98,64,397	9,93,219.86	2,08,57,617	2,48,30,497.00	2152545266 Dt.15.05.2019
6	Z2019041862	3188212 Dt.29.04.2019	1,98,64,397	9,93,219.86	2,08,57,617	2,48,30,497.00	2152545266 Dt.15.05.2019
7	Z2019041887-1	3249080 Dt.04.05.2019	1,98,64,397	9,91,492.53	2,08,57,617	2,47,87,317.15	215549089 Dt.17.05.2019
8	Z2019041818	3348253 Dt.09.05.2019	2,00,61,772	10,03,088.62	2,10,64,861	2,50,77,215.50	216378376 Dt.24.05.2019
9	Z201904899	3348273 Dt.09.05.2019	2,00,26,882	10,01,344.12	2,10,28,227	2,50,33,602.99	216378376 Dt.24.05.2019
10	Z2019048100	3348274 Dt.09.05.2019	2,00,26,882	10,01,344.12	2,10,28,227	2,50,33,602.99	216378376 Dt.24.05.2019
11	Z20190531056	3727181 Dt.05.06.2019	1,24,10,260	6,20,517.99	1,30,30878	1,55,12,950.00	220455656 Dt.24.06.2019
12	Z20190614028	3931640 Dt.20.06.2019	34,52,226	1,72,611.30	36,24,837	43,15,282.40	222209688 Dt.06.07.2019
13	Z20190614029	3931462 Dt. 20.06.2019	84,57,954	4,25,897.68	88,80,851	1,05,72,441.88	222209688 Dt.06.07.2019
Total impact on account of Safeguard Duty					27,72,44,397		

OP No. 52 of 2019.

(Amount in Rupees)

Sl. No.	Invoice No.	BOE No. & Date	Safeguard Duty @ 25% paid	IGST Paid on SGD paid	Total impact on a/c of SGD + IGST	Total Challan Amount* (in Rs.)	Payment Confirmation No. & Date
1	Z201904 1824	3083327 Dt.19.04.2019	1,60,95,147	8,40,757.37	1,68,99,905	2,10,18,934.00	214074753 Dt.07.05.2019
2	Z201904 1837-1	3082942 Dt.19.04.2019	2,46,20,528	12,31,026.38	2,58,51,554	3,07,75,659.58	214074753 Dt.07.05.2019
3	Z201904 1885-1	3249057 Dt.04.05.2019	2,03,84,823	10,19,241.17	2,14,04,065	2,54,81,029.24	215519089 Dt.17.05.2019
4	Z201904 1886-1	3249059 Dt.04.05.2019	2,03,49,379	10,17,468.57	2,13,66,840	2,54,36,714.00	215519089 Dt.17.05.2019
5	Z201904 1889-1	3249062 Dt.04.05.2019	5,70,06,602	28,50,330.08	5,98,56,932	7,12,58,251.94	215519089 Dt.17.05.2019
6	Z201905 7055-1	3451918 Dt.15.05.2019	1,30,68,504	6,53,425.21	1,37,21,929	1,63,35,630.22	217224667 Dt.31.05.2019
7	Z201905 7054-1	3451955 Dt.15.05.2019	5,00,89,965	25,04,498.25	5,25,94,463	6,26,12,456.25	21760068 Dt.01.06.2019
8	Z201904 18101	3452083 Dt.16.05.2019	5,75,37,222	28,76,861.11	6,04,14,083	7,19,21,527.70	217224667 Dt.31.05.2019
9	Z201905 31055	3914994 Dt.13.06.2019	4,27,58,547	21,37,927.33	4,48,96,474	5,34,95,148.00	222209688 Dt.06.07.2019
Total impact on account of Safeguard Duty					31,70,06,245		

24. According to these petitions, the petitioners have imported the solar modules from China during January 2019 and May 2019. As per safeguard duty notification dated 30.07.2018, the petitioners have to pay safeguard duty at the rate of 25% and IGST at 5% on SGD the petitioners have claimed in the para 26 of the petition, amount due to the introduction of /imposition of safeguard duty. The consolidated claim is as detailed below:

Sl. No.	Petition No.	Impact of SGD (Amount in Rs.)
1	OP No.48/2019	28,79,95,571.00
2	OP No.49/2019	29,09,70,940.00
3	OP No.50/2019	29,22,99,717.00
4	OP No.51/2019	27,72,44,397.00
5	OP No.52/2019	31,70,06,245.00

25. a) Per contra, the learned Counsels for respondents have submitted that with regard to carrying cost, the law stands settled that only if there is a provision in the PPA for restoration of developer to same economic position as if the change in law event has not occurred, the developer / seller is eligible for carrying cost for such allowed change in law event from the effective date of change in law until the same is paid ESCOMs as allowed by the appropriate authority by an order/ judgment. In the present case(s), neither does the PPA entered into between the parties contain a single provision that permits/ stipulates restoring the solar power generator to the same financial position as prior to the event of change in law, nor does it contemplate the payment of carrying cost or interest of any kind to the aggrieved party on account of change in law. In this regard, reliance is placed on the decision rendered by the Hon'ble Central Electricity Regulatory Commission (CERC) in the Petition No.188/MP/2017, wherein upon analyzing this issue in depth it came to the reasoned decision that unless carrying cost is stipulated in the PPA, the aggrieved party is not entitled to it. In view of above, the petitioners herein are not entitled to relief of restoration to the previous financial position, by way of interest/ carrying cost from the date of incurring till the date of

reimbursement as the PPA entered into by both the parties contains no provision for such relief. The PPA is a legally binding contract entered into by the parties, reflecting the intention of both the parties and is bound by the terms of the same.

- b) It is submitted that the provision under Article 5.1.1(g) of the PPAs the obligations of the solar power developer are envisaged. It states that the solar power developers shall be responsible for all payments related to any taxes, cesses, duties or levies imposed by the Government Instrumentalities or competent statutory authority on land, equipment, material or works of the project to or on the electricity consumed by the project by itself or on the income or assets owned by it. It is clear from the above stated clause of the PPA that the petitioner is responsible for the payment of all taxes and duties imposed by the Government in relation to all works connected to the project. It is in cognizance of this fact that the petitioner had bid in response to the respondent herein. The bid of an eligible bidder has to quote an all-inclusive bid that includes the cost of any existing foreseeable taxes and duties as stipulated in the above said article such as taxes, cess, anti-dumping duty etc. The safeguard duty notification dated 30.7.2018 stipulates the safeguard duty@25% ad valorem minus anti-dumping duty if any. In view of the fact that the anti-dumping duty payable by it, the same was included in the cost of the petitioner's bid as agreed in terms of the PPA. The only change in law benefit,

if any, payable to the petitioner would be the difference in the rates stated in the safeguard duty notification and the anti-dumping duty payable.

26. We have held that imposition of safeguard duty is 'Change in Law' event and in the corollary the petitioner is entitled for reimbursement of safeguard duty from the respondents along with IGST paid by it, only to the extent of minimum contracted energy as envisaged in the provisions of the PPA.

27. The petitioners in these petitions contented that restitution is an integral part of compensation granted for 'Change in Law' and Carrying Cost in simple terms is the compensation for the time value of the money. The petitioners have relied on the following Judgments/rulings of various Hon'ble Superior Courts, Appellate Tribunal and other Electricity Regulatory Commissions.

- a) Yadava Kumar vs. National Insurance Company Limited, (2010) 10 SCC.
- b) Indian Council for Enviro-Legal Action vs. Union of India (2011) 8 SCC 16.
- c) Shaym Singh vs. Daryao Singh &Ors. (2003) 12 SCC 160.
- d) SLS Power Limited vs. Andhra Pradesh Electricity Regulatory Commission (In Appeal Nos.150,166,168 & others, orders of Hon'ble Appellate Tribunal for Electricity).

28. The learned Counsels for the respondents have placed reliance on the following rulings.

- a) Adani Power Private limited v. CERC & Others.
(Appeal No.210 of 2017).
- b) M/s. GMR Warora Energy limited v. CERC & Others.
(Appeal No.211 of 2017).
- c) M/s. Renew Wind Energy limited v. NTPC Limited.
(Petition No.187/MP/2018).
- d) Prayatna Developers Limited v. NTPC Limited &
Others (Petition No.43/MP/2019).

29. At the cost of repetition, we would like to state that the petitioners are seeking reimbursement of safeguard duty paid/remitted by them to Customs Department, while importing solar modules/ cells/ panel from China on account of safeguard duty levied due to Safeguard Duty Notification No.01/2018-Customs (SG) dated 30.7.2018 issued by the Government of India along with carrying cost from the date of incurring expenses to the date of actual payment. The petitioner seeking reimbursement of safeguard duty on import of solar module/panels from China which he has paid through Bank challans while getting customs clearance of at Chennai Port. The petitioners have incurred additional expenditure on account of change in law event and claimed reimbursement along with interest on additional working capital deployed for its solar project as envisaged under Article 15.1 and 15.2 of the PPA.

30. The Commission notes that petitioners have imported solar modules/cells from China and incurred additional expenditure due to imposition of safeguard duty @ 25% on import of solar modules/cell (whether or not assembled in modules or panels) within the period specified i.e., from 30.7.2018 to 29.7.2019.

This Commission, answering the Issue No.2, has opined that the Safeguard Duty Notification No.01/2018, dated 30.7.2018 is as" Change in Law" event, thus the petitioner is entitled to get relief under the provisions of Article 15.2 of the PPA, with reference to minimum contracted energy as per provisions of PPA.

31. Now, we proceed to examine whether the prayer of petitioners seeking carrying cost/ interest on working capital is permissible for reimbursement under the provisions of the PPA entered with the respondents or otherwise.
32. The petitioners contended in their petitions stating that restitution is an integral part of compensation granted for 'change in law' and carrying cost in simple terms is the compensation for time value of money. The petitioners relied upon the ruling reported in (2010) 10 SCC 341 in case of Yadav Kumar vs. National Insurance Company Limited. We have perused the aforesaid judgement wherein the Hon'ble Supreme Court defined the damages and compensation. According to it, the word compensation stands on slightly higher footings. However, the Hon'ble Supreme Court held that 'at the same time' it is true that there cannot be any rigid or mathematical precision in the matter of determination of compensation.
33. The learned Counsels for respondents placed reliance on the judgment of Hon'ble Supreme Court in case of Union of India vs. Tulasiram Patel (1985) 3 SCC 398, wherein it was held that "when express inclusions are specified, anything which is not mentioned explicitly is excluded." Further, they submit

that in the absence of the express provision in the PPAs, it is not open for the petitioner to claim relief under principles of equity. The petitioners are not entitled to interest on incremental working capital at normative interest rate or otherwise to put the petitioners to the same economic position as if change in law has not occurred.

34. The Commission observes that in the Judgment of Hon'ble Appellate Tribunal for Electricity dated 13.4.2018 in Appeal No.210 of 2018 in the case of Adani Power Limited vs. Central Electricity Regulatory Commission & Others, it was held that since Gujrat Bid-01 PPA has no provision for restoration to the same economic position, the decision of allowing carrying cost will not be applicable. The relevant portion of the judgment dated 13.4.2018 reads as under:

Para 12 d) x. "further, the provisions of Article 13.2 i.e., restoring to the same economic position as if Change in Law has not occurred is in consonance with the principles of 'restitution' i.e., restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principles of restitution and judgment of the Hon'ble Supreme Court in case of Indian Council for Environ-Legal Action vs. Union of India & Others., we are of the considered opinion that the Appellant is eligible for carrying cost arising out of approval of the change in law events from the effective date of change in law till the approval of the said event by the appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if the Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA."

35. The Commission observes that though there is provision of restitution as mentioned in clause 5.7 of the Competitive Bidding Guidelines and petitioners have insisted upon to consider the same in the instant case(s), the Commission notes that if such a provision exists in Bidding Guidelines then petitioners would have insisted upon to incorporate such provision in the PPA before entering into with the respondents. We are of the considered opinion that the PPA having signed by both the parties, is a binding document and no claim could be made by the petitioners de hors the provisions of the PPA. In view of above, the averments made by the petitioners are not tenable and liable to be rejected, and accordingly rejected.
36. The Commission placed reliance on the judgment of Hon'ble Supreme Court in the case of Union of India vs. Tulasiram Patel (1985) 3 SCC 398, wherein it was held that "when express inclusions are specified, anything which is not mentioned explicitly is excluded." Therefore, the Commission notes that there are no explicit or implicit provisions available under the instant PPAs entered by both the parties which allows the carrying cost/interest on incremental working capital as sought by the petitioners to compensate them. Therefore, Commission holds that the claims made for grant of carrying cost/interest on working capital for reimbursement to be made by the Respondent are not sustainable. Hence, we answer, issue No.3 accordingly.

37. **Issue No:4:** Whether the respondents prove that the petitioners have imported excess solar modules and claims are excessive?
38. The learned Counsel for petitioners submitted that PPAs between Fortum Solar India Private Limited and Respondents i.e., BESCO, HESCO, CESC and MESCOM have been signed for five solar power projects for 50 MW_{AC} capacity of Solar PV ground mounted Project in different blocks of Pavagada Solar Power park.
39. The learned Counsel for petitioners submitted that any solar PV project consists both AC and DC systems, while the solar PV modules generate DC power, the "Contract Capacity" promised for supply of energy under PPA is measured in AC terms. The DC power generated is converted to AC power by the use of inverters and higher DC power is deployed to meet the AC power committed under the PPA. The solar PV generation is dependent on incidence of solar radiation on modules which is naturally not uniform throughout the day. Solar PV modules rated on watt-peak basis, which means, the maximum output subject to ambient condition. Thus, a 300 Wp module will generate 300 watts of power only during some time i.e. peak time of the day. As a result, inverters are under-utilized during most parts of the day and Capacity Utilization Factor (CUF) of modules is less. Further, the solar modules are also subjected to a year-on-year degradation of 0.7%. Hence, in order to optimize CUF and match it to the range prescribed under the PPA, the higher DC capacity is used in designing solar projects.

39.1 It is contended by the petitioner that the Article 5.6 of the PPA stipulates that petitioner would be liable for a penalty if he fails to generate a minimum energy of 79.056 Million Units (MU) in a given year as for example in OP No.48/2019. Thus, in order to fulfil its obligations under the PPA to ensure supply of Contracted Capacity in MW_{AC} terms and to maintain the CUF within the range contemplated under the PPA, a higher MW DC capacity of modules have been installed by the petitioner. In this regard, the MNRE has issued an advisory/clarification which clarifies the installation of higher MW DC capacity than the contracted/name plate MW AC capacity and is a prudent industrial practice followed by solar power developers across the country in order to fulfil their contractual obligations under the PPA and to avoid imposition of penal charges.

39.2 The Learned Counsel for petitioners submitted that, on import of excess number of solar modules from China also safeguard duty @25% on value of solar modules and 5% IGST on safeguard duty paid as the same is to be reimbursed by the respondents. Because the Solar PV modules of the Petitioners have to generate the "Contracted Capacity" promised for supply of Minimum Quantum of Energy of 79.056 Million Units (MU) (as in the case of OP No.48/2019), the petitioner installed excess modules to the Respondents in order to fulfil its obligations under PPA. The petitioners in order to ensure supply of Contracted Capacity in MW AC terms and to avoid penalty in case of short supply of energy and maintain the CUF within the range

contemplated under the PPA, a higher MW_{AC} capacity of modules have been installed.

39.3 Per contra, the learned Counsels for respondents contended that the petitioners have imported excess solar modules against the contracted capacity of the solar power plant. Therefore, the petitioners are not entitled for the amount claimed in para 26 of the petitions. The petitioners have produced invoices, bill of entry, challan for customs duty along with payment receipts at Annexure-P7 (colly) of the petition. It contains details of the invoice numbers, date, quantities, watts, unit prices in US Dollar and total amount etc. It may be seen from the Annexure-P7, that the total quantity of modules procured by the petitioners are more than the required solar modules to achieve minimum contracted energy supply to respondents. In order to substantiate, the respondents have submitted tables to show that the quantities of solar module purchased by the petitioners, the capacity producible from the same and the capacity of power actually contracted by the parties. The details are given as under:

OP No. 48 of 2019.

	Total Quantity of Solar Modules	Total Watts that can be produced	SG Duty + GST on SGD claimed in Rs.
As per invoices produced by the Petitioner	2,06,451	6,91,61,085	28,79,95,571
For the Contracted Capacity (50 MW)	1,49,254	5,00,00,000	20,82,06,371
Excess number of Solar Modules Imported	57,197	1,91,61,085	7,97,89,200

OP No. 49 of 2019.

	Total Quantity of Solar Modules	Total Watts that can be produced	Safeguard Duty + GST on SGD claimed in Rs.
As per invoices produced by the Petitioner	2,10,337	7,04,62,895	29,09,70,940.23
For the Contracted Capacity (50 MW)	1,49,254	5,00,00,000	20,64,71,037.15
Excess number of Solar Modules Imported	61,083	2,06,42,895	8,44,99,903.08

OP No. 50 of 2019.

	Total Quantity of Solar Modules	Total Watts that can be produced	Safeguard Duty + GST on SGD claimed in Rs.
As per invoices produced by the Petitioner	2,11,632	7,08,96,720	29,22,99,717
For the Contracted Capacity (50 MW)	1,49,254	5,00,00,000	20,82,06,371
Excess number of Solar Modules Imported	62,378	2,08,96,720	8,40,93,346

OP No. 51 of 2019.

	Total Quantity of Solar Modules	Total Watts that can be produced	Safeguard Duty + GST on SGD claimed in Rs.
As per invoices produced by the Petitioner	1,97,834	6,61,82,742	27,72,44,397
For the Contracted Capacity (50 MW)	1,49,254	5,00,00,000	20,82,06,371
Excess number of Solar Modules Imported	48,580	1,61,82,742	6,90,38,026

OP No. 52 of 2019.

	Total Quantity of Solar Modules	Total Watts that can be produced	Safeguard Duty + GST on SGD claimed in Rs.
As per invoices produced by the Petitioner	2,21,910	7,42,48,200	31,70,06,245.95
For the Contracted Capacity (50 MW)	1,49,438	5,00,00,000	21,34,77,393.69
Excess number of Solar Modules Imported	72,472	2,42,48,200	10,35,28,852.26

40. The learned Counsel for petitioners submitted rejoinder to reply the statement of objections filed by the respondents, countering the arguments of the respondents that petitioners have procured excess quantity of 57,197 in case of OP No.48 of 2019 (as also in other petitioner's projects). In order to substantiate the claim of Respondent that in OP No.48/2019, 2,06,451 modules procured by the petitioner can generate power corresponding to 6,91,61,085 watts, whereas the capacity of the solar power plant is only 5,00,00,000 watts. In this regard, it is submitted that the ad-hoc calculation rendered by the respondent to support its contention run contrary to the technical working and concept of a solar PV Plant. The solar power plant encompasses both AC and DC systems, while the solar PV modules generate DC power, the Contracted Capacity promised for supply under the PPA is measured in AC terms as envisaged under Article 5.6 of the PPA.

41. The Learned Counsels for respondents countered the averments made by the petitioners stating that as per Article 5.6 of the PPA, the petitioners have declared Minimum Capacity Utilization Factor (CUF) of 18% and Maximum CUF of 30%, which was accepted by respondents and accordingly, PPAs have been signed. It is submitted that petitioners have never disclosed respondents that petitioners are going to install higher capacity of DC modules to provide 50 MW_{AC}. As per provisions of PPA, minimum CUF of 18% is mandated, providing higher CUF of 30% is a commercial decision of the petitioners and respondents cannot be held responsible for providing any additional reimbursement of safeguard duty paid on excess import of solar modules/ cells from China.

42. The contention of the petitioners that Hon'ble Maharashtra Electricity Regulatory Commission (MERC) in case No.259/2019 has set-out a rational for calculating the permissible extent of DC solar modules that could be installed by solar power developers to meet the contracted capacity requirement in AC terms and allowed excess DC capacity in the range of approximately 41% to 57%. The respondents contended that the facts mentioned in the Order of MERC, is not similar to this case and therefore not applicable to these petitions.

43. The Respondents contend that the CUF is considered at a range of 18% to 30% in the instant case after considering the degradation factor. The petitioners voluntarily have quoted for a Maximum CUF of 30%. The

petitioners cannot opt to achieve higher CUF merely by increasing solar modules and same is not a prudent practice. Instead, the petitioners should have opted for sophisticated module which generates higher energy with lower degradation. Hence, while executing PPA, respondents herein obliged to purchase the energy of minimum capacity from contracted capacity and not obliged to reimburse the safeguard duty on excess modules installed in their solar power project.

44. The competitive bidding warrants the lowest bid price and it never dependent on CUF. The petitioner was able to quote the lower bid price by installing excess modules to achieve higher CUF against the developer who have quoted higher tariff and intended to use better quality of panels. Therefore, any payment towards additional modules to the petitioners will cause injustice to solar developer who intended use good quality solar panels and quoted higher bids than these petitioners and same defeats the object of competitive bidding.

45. To examine this issue, as to what quantity of solar modules imported from China by the petitioners for the solar power project mentioned in this order could be allowed, as per provisions of the PPA entered by both the parties.

46. It would be appropriate to go through the relevant definition and clause of the PPA entered by both the parties.

- i) Article 21.1 of PPA defines "Contract Capacity"
"Contract Capacity" shall mean 50MW contracted by the ESCOM for supply by the Developer to ESCOM at the delivery point from the solar project."
- ii) Article 21.1 defines Contract Year; "Contract Year" shall mean the period beginning from the Effective Date and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31."
- iii) Article 21.1 also defines Capacity Utilization Factor" or "CUF". "CUF" shall have the same meaning as provided in CERC (Terms and Conditions for Tariff determination from the Renewal Energy Sources) Regulations, 2009 as amended from time to time. Here, the CUF is expressed in AC terms.
- iv) Article 5 of PPA envisages Obligation of the Developer. Article 5.6- Right to Contract Capacity & Energy.

This Article says that ESCOM, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the solar power developer beyond 131.76 Million kWh(MU) at maximum CUF of 30%. If for any Contract Year, it is found that the solar power developer has not been able to generate minimum energy of 79.056 Million kWh(MU) corresponding to a Minimum CUF at 18% i.e., Maximum CUF mentioned by the Bidder at the time of PPA signing minus 12% for solar PV on account of reasons solely attributable to the solar power developer, the non-compliance by the solar power developer, the non-compliance shall make solar power developer liable to pay the compensation provided in the Agreement as payable to concerned ESCOM. This compensation shall be applied to the amount of shortfall in generation during the Contract Period. The Amount of compensation shall be

computed at the rate equal to the compensation payable by the concerned ESCOM, subject to a minimum of 50% of the applicable tariff.

In case of purchase of any excess energy:

Purchase of any excess energy, beyond the energy generated corresponding to a maximum CUF mentioned by the solar power developer during the signing of the PPA for solar PV shall be charged at a rate equivalent to 75% of PPA tariff or 75% of the applicable APPC charges (as published by KERC), whichever is less, provided first right of refusal will vest with concerned ESCOM.

v) The relevant provisions of Request for Proposal (RfP) and PPA entered by both the Parties.

a) The Request for Proposal (RfP)- Volume-I No.RFP NO. KREDL/ 07/SG/ 650/ Pavagada Park /809-A/2018-19, dated 23.04.2018, CUF "means the annual capacity utilization factor has the meaning ascribed to it in clause 1.4 in the RFP.

b) Clause 1.4 of RfP: Capacity Utilization Factor:

1.4.1 *The bidder shall note that there is no cap on Maximum CUF. The solar developer shall mention the Maximum CUF during the signing of PPA with ESCOMs. The Minimum CUF shall be, the Maximum CUF mentioned by the bidder at the time of PPA signing minus 12%. The solar power developer shall maintain the Minimum CUF as mentioned above for the project capacity measured in AC during the PPA term.*

Illustration:

If a bidder mentioned the Maximum CUF of 32%, then the Minimum CUF shall be 20% (i.e., $32-12=20$).

The bidder is allowed to select the DC capacity of the project subject to the prudent utility practices prevailing in the State of Karnataka, but shall inform the same to KREDL, ESCOM, CEIG and any other concerned authority.

Article 21.1 of PPA defines "Capacity Utilization Factor" (CUF), which says that CUF "shall have the same meaning as provided in CERC (Terms and Conditions for Tariff Determination from Renewal Energy Sources) Regulations,2009 as amended from time to time. Here, the CUF is expressed in AC term.

- c) The Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewal Sources) Regulations,2009 also define the Capacity Utilization Factor (CUF) for Solar PV project. The extract of Regulation 58 is given below:

Regulation 58(1) "The Capacity Utilization factor for Solar PV Project shall be 19%."

- d) The Article 5 of the PPA envisages the Obligations of Solar Power Developer and Article 5.6 deals with the Right to Contracted Capacity & Energy. This Article mandates that at any time during Contract Year, concerned ESCOM i.e., Respondent in the instant case (OP No.48/2019) shall not be obliged to purchase any additional energy from the Solar Power Developer beyond 131.76 Million Units at maximum CUF of 30%, provided the respondents willing to procure additional energy beyond the maximum CUF then the petitioner is paid at the rate equivalent to 75% of PPA Tariff or 75% of the Applicable APPC charges, whichever is less. However, if the solar power developer has not been able to generate contracted minimum

energy of 79.056 million unit (MU) corresponding to a minimum CUF of 18%, would be liable to pay the penalty as per provision of the PPA.

- e) It could be noted here that there was specific clause 1.4 of RfP dated 23.04.2018 that the bidder is allowed to select the DC capacity of the project subject to prudent utility practices prevailing in the State, but shall inform the same to KREDL, ESCOM and other authorities. In the instant case, the respondent submitted that the petitioners have never informed / intimated before importing the excess solar modules from the China and installed the solar modules without intimating the respondents. This Commission notes that during proceedings of these cases, the petitioners have not placed any such document or evidence to establish that they have complied the requirements of the provision of RfP document dated 23.04.2018 which were binding on their part.
- f) As per CERC (Terms & Conditions for Tariff Determination from Renewal Energy Sources) Regulations,2009 and PPA Article 21.1, the CUF is allowed as 19% for Solar PV Projects. Accordingly, both the parties have agreed for the contract to supply of minimum of energy on the basis of 19% of CUF, which are binding on both the petitioner and respondent.
- g) It could be seen from the advisory/clarification letter dated 05.11.2019 of MNRE, which says that the design and installation of solar capacity on DC side should be left to the generator/ developer, provided the solar power generator meets the range of energy supply based on CUF requirement. In the instant cases, the range of the CUF is 18% to 30%, but the minimum range of energy supply based on capacity utilization factor is 18% with energy of 78.84 Million Units to 79.056 Million Units. However, the contracting party is not obliged

to buy any power in excess of the contracted quantum of energy. In the instant case (in OP No.48/2019 to 52/2019) the petitioners have entered in to contract of 50 MWAC capacity of each project with respondents and agreed to supply energy on the basis of 18% CUF and minimum contracted energy ranges from 78.84 million units to 79.056 million units at the rate of Rs.2.85/kWh and there is no obligation on the part of respondents to purchase more energy than minimum contracted energy. If he does not supply energy with correspondence with the contracted capacity, then it is liable to pay the penalty. The Commission notes that in these cases, the petitioners have imported solar module quantity over minimum CUF of 18% and minimum contracted capacity and paid safeguard duty and IGST thereon and now are seeking reimbursement claims from the respondents on such quantity without intimating the respondent as it was required under clause 1.4 of Request for Proposal Document dated 23.04.2018. On the basis of that RfP document these bids were invited by KREDL and petitioners have succeeded in and entered into PPA with respondents. The Commission is of the opinion that the advisory letter of MNRE will not come to aid of the petitioners for seeking reimbursement of safeguard duty on additional quantity of solar modules imported by them without intimation of respondents as mandated under the clause of RfP and it is a commercial decision of the petitioners for which respondents and consumers cannot be financially be burdened. Therefore, the averments made by the petitioners in this regard are not tenable.

47.The petitioners contended that the Hon'ble Maharashtra Electricity Regulatory Commission (MREC) in case No.259 of 2019 has allowed installation of additional solar power modules against minimum threshold of 19% CUF to optimize performance of the plant by achieving higher CUF. To

bring the clarity on this issue, the extract of para 19 of the said order of the Hon'ble Commission is as under:

Para-19 "-----In case, if MSDCL's argument is accepted that it does require energy more than 19% CUF, then it would not only lose the opportunity of procuring such additional energy at lower rate of Rs.2.72/kWh, but would be required to undertake separate bidding process for procuring such additional energy as MSDEL is still under shortfall in its Solar RPO."

We observed that the reliance placed by the petitioners is not applicable to the instant case.

48. Keeping the above facts in view, the Commission is of the opinion that the decision of petitioners of importing additional solar module form China with the intention of optimize performance of the solar PV plant by achieving higher CUF of 30% as against minimum threshold of CUF of 18% as mentioned in bidding document. Such optimization of CUF allowed the petitioners to offer a competitive rate to the Respondents. Hence, the additional quantity of solar modules imported by the petitioners from China without notice to the respondents as it was required under provisions of RfP document dated 23.04.2018, such additional financial burden cannot be allowed to pass on to the respondents. Therefore, we are of the considered opinion that reimbursement of safeguard duty on additional quantity of solar modules against the minimum contracted capacity of supply of energy, which are sought by the petitioners cannot be considered. Hence, we reject the claims

made for excess modules imported and safeguard duty mentioned in para 26 of the petition. Therefore, there are entitled to the reimbursement of safe guard duty and corresponding IGST as indicated in the following table:

(Amount in Rupees)

For the contracted capacity (50MW)			
OP No.	Total Quantity of Solar Modules	Total Watts that can be produced	Safeguard Duty + GST on SGD claimed
48/2019	1,49,254	5,00,00,000	20,82,06,371.00
49/2019	1,49,254	5,00,00,000	20,64,71,037.15
50/2019	1,49,254	5,00,00,000	20,82,06,371.00
51/2019	1,49,254	5,00,00,000	20,82,06,371.00
52/2019	1,49,438	5,00,00,000	21,34,77,393.69

49. In view of the above discussion, we answer Issue No.4 accordingly.

50. **Issue No.5:** Whether the Petitioners are entitled for appropriate and proportionate increase in tariff due to imposition of Safeguard Duty and consequently amend Tariff specified in the PPA, dated 24.07.2018, 25.07.2018 and 27.07.2018?

51. The learned counsel for the petitioners has made submission to this Commission to evolve the mechanism to reimburse the safeguard duty and IGST on import of solar modules from the China to compensate the additional expenditure by way of increasing in tariff in lumpsum, from the date on which the additional expenditure incurred by the petitioners to the date of actual reimbursement by the respondents. The learned counsels for respondents submitted that the Commission may take an appropriate decision in this regard. The Commission notes that as per Article 15.2.1 deals with the relief for Change in Law which envisages that the agreed party shall

be required to approach the KERC for seeking approval for Change in Law. Further Article 15.2.2 of PPA states that, the decision of KERC to acknowledge a Change in law and date from which it will become effective, provide relief for the same, shall be final and governing on both the parties. The Commission has acknowledged the Change in Law event in the instant cases. The Commission is of the opinion that the petitioners are entitled to get reimbursement of safeguard duty including IGST thereon, on import of solar modules from China, on proportionate quantity as indicated in table of para 48, by way of additional tariff.

52. Hence, we answer the Issue No.5 in the affirmative.

53. **Issue No.6:** What order?

54. The petitioners are required to submit the relevant documents as produced with these petitions for claiming the reimbursement of safeguard duty and IGST project basis.

(a) Purchase contract of import of solar modules entered between the Supplier of Solar Modules:

(Description of SPV model in Wp (Watt peak), number of modules in pieces , quantity in watts, rate per Watt in US Dollar and total amount of amount in US Dollar)

(b) Bill of Entries of import of solar modules:

(Name of port, name of importer with detail address of specific solar project for which modules imported, name of suppliers, date, unit price of assessment value, amount of safeguard duty and IGST payable)

(c) Commercial Invoices details:

(Description of solar photovoltaic modules, Quantity, total power in Watts, Unit Price per Watt in US Dollar /Watt, Unit price in US Dollar /Per Piece and Amount taxable in US Dollar)

(d) Challans for having paid the Customs Duty:

(Name of Bank, Name of Importer, Challan No, Document No. and Amount in Rs.)

(e) Documents to evidence for having paid the Safeguard Duty and IGST

55. While making payment of the above said amount as in indicated in the table at para 48, for reimbursement of safeguard duty and IGST thereon, incurred by the petitioners and arrive an additional tariff per unit on the basis of minimum contracted energy agreed in the PPA, to be paid spread over for the remaining period of the PPAs from the date of this Order.

For the above reasons, we proceed to pass the following:

ORDER

- a) The petitions are partly allowed.
- b) The petitioner and the respondent in each of the cases shall verify the amount payable to the Petitioner in the respective cases after examining the documents and other directions given in para 48 & 54 above. This process shall be completed within a period of two months from date of this order. If the above process is not completed within the stipulated time stated above due to the fault of the respondent, the defaulting respondent shall be liable to pay interest at the rate of 8% per

annum from the date of default to the date of completion of the process of verification, on the amount payable to the concerned Petitioner.

- c) The amount found to be due and payable to the petitioners shall be spread over for the remaining period of the PPA from the date of this order and shall be reimbursed by appropriate increase in tariff per unit taking into consideration the minimum contracted energy as per provisions of the PPA for the respective Solar Power Projects.
- d) The petitioners are not entitled to any of the carrying cost.
- e) The petitioners shall abide by the undertaking as per the Affidavit dated 19.09.2020 to reimburse the amount received from the Respondents, if any, in the event of the Hon'ble Supreme Court of India, in SLP No.24009-24010/2018 setting aside the Safeguard Duty Notification No:01/2018 Custom (SG) dated 30.07.2018, issued by Ministry of Finance, Government of India. In case, the Petitioners failed to repay the amount received from the Respondents, then the Respondents are at liberty to adjust the amount due to them in the monthly tariff bills.
- f) Accordingly, the petitioners and respondents shall submit the Supplementary Power Purchase Agreements for the approval of the Commission.
- g) The original Order shall be kept in OP No.48/2019 and copies, thereof, in OP Nos.49/2019,50/2019, 51/2019 and 52/2019.

Sd/-
(SHAMBHU DAYAL MEENA)
Chairman

Sd/-
(H.M. MANJUNATHA)
Member

Sd/-
(M.D. RAVI)
Member