

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION  
GANDHINAGAR**

**Petition No. 2063 of 2022.**

**In the matter of:**

**Petition under Sections 86 (1) (e), 86 (1) (f) and 86 (1) (k) of the Electricity Act, 2003 read with Article 9 of the Power Purchase Agreement dated 08.07.2020 executed between M/s Juniper Green Three Private Limited and Gujarat Urja Vikas Nigam Limited for supply of 190 MW capacity of Solar power from its Solar PV Power plant located in the State of Gujarat seeking *inter-alia* Declaration/Approval of Change in Law in Basic Custom Duty on Solar Inverters pursuant to issuance of Notification No. 07 of 2021 - Customs dated 01.02.2021 and increase in Rate of Goods and Service Tax (GST) on Solar Modules and Other Solar Power Generator Equipment vide Notification No. 8 of 2021 - Integrated Tax (Rate) dated 30.09.2021 for ensuring Regulatory and Financial certainty of the Project as well as to evolve suitable Compensatory Mechanism or follow the Mechanism, provided under Clause 9.2.2. of the PPA in order to compensate the Petitioner for the impact of Additional Costs incurred due to Change in Law events so as to restore the Petitioner to the same Economic Position as if the Change in Law events have not occurred.**

**IA No. 32 of 2022 in Petition No. 2063 of 2022.**

**In the Matter of:**

**IA under Section 94 (2) of the Electricity Act, 2003 to bring on record subsequent facts and additional documents in Petition No. 2063 of 2022.**

Petitioner : Juniper Green Three Pvt. Ltd.  
Represented by : Ld. Adv. Hemant Sahai along with Nitsh  
Gupta and Rishabh Sehgal.

Vs.

Respondent : Gujarat Urja Vikas Nigam Limited  
Represented by : Ld. Adv. Ranjitha Ramchandran along with Ms.  
Bhavani, Ms. Vaishali Dalal.

**CORAM:**

**Anil Mukim, Chairman**  
**Mehul M. Gandhi, Member**  
**S. R. Pandey, Member**

Date: 07/08/2024.

**DAILY ORDER**

1. The matter was heard on 23.02.2024.
2. At the outset the Ld. Adv. Hemant Sahai appearing on behalf of the Petitioner submitted that the present Petition is filed under Section 86 (1) (e), (f) and (k) of the Electricity Act, 2003 read with Article 9 of the PPA dated 08.07.2020 executed between the parties for supply of power generated from 190 MW solar power plant in the State of Gujarat seeking declaration of Change in Law events and consequential recovery on account thereof. Ld. Adv. further submitted that there are two issues involved in the present Petition. First issue is imposition of Basic Customs Duty (BCD) on Solar Invertors by the Notification No. 03 of 2021- Customs and Notificaton No. 07 of 2021- Customs dated 01.02.2021 and second issue is increase in rate of Goods & Service Tax (GST) on Solar Modules & other Solar Power Generator equipments vide Notificaton No. 08 of 2021 of Department of Revenue, Ministry of Finance, Govt. of India, regarding Integerated Tax (rate) dated 30.09.2021 for generation of renewable energy as 'Change in Law' event in terms of the PPA executed between the parties. The GST rates on the solar modules and other solar power generator equipments needs to be compensated. The Petitioner

has also claimed carrying cost as the impact of additional cost incurred by the Petitioner due to Change in Law events as per terms of the PPA.

2.1. It is submitted that vide Notification No. 03 of 2021 dated 01.02.2021 – Customs, Ministry of Finance, Government of India, there is change / increase in rates of the Basic Custom Duty (BCD) from 5% to 20% and vide Notification No. 8/2021 dated 30.09.2021 the rates of GST for renewable energy devices and their parts have been amended with an increase of GST rate from 5% to 12% which has also impacted on cost of Petitioner's the solar power plant. The Petitioner has issued 'Change in Law' Notice under Article 9 of the PPA to the Respondent on 17.02.2021 and 12.01.2022 *qua* the aforesaid "Change in Law" Events.

2.2. It is further submitted that the "Change in Law" events have occurred after the last date of bid submission i.e., 07.03.2020 under the Competitive Bidding process followed by e-reverse auction undertaken by the Respondent Gujarat Urja Vikas Nigam Limited (GUVNL) vide Request for Selection (RfS) No. GUVNL/500 MW/Solar (Phase VIII) dated 07.02.2020 for 500 MW grid connected Solar Photovoltaic Power Projects to be setup in Gujarat, wherein, various bidders including the Petitioner submitted their bids and after evaluation of the same, the Respondent accepted the bids and declared the Petitioner as one of the successful bidder with quoted tariff of Rs. 2.63 per unit to develop 190 MW capacity Solar Power Project in the State of Gujarat. Thereafter, the Respondent issued Letter of Award on 11.06.2020 in favour

of the Petitioner and subsequently the Power Purchase Agreement was executed on 08.07.2020 between the Petitioner and the Respondent GUVNL. After the last date of bid submission, the Ministry of Finance, Government of India issued following two notifications which has resulted an increase in the cost of the Project which are as under:

2.2.1. Change in Basic Customs Duty on Solar Inverters pursuant to issuance of Notification No. 03 of 2021 - Customs and Notification No. 07 of 2021 - Customs dated 01.02.2021.

2.2.2. Increase in rate of Goods and Services Tax on Solar Modules and other equipments of solar power plant vide Notification No. 8/2021-Integrated Tax (Rate) dated 30.09.2021. It is referred to the Notification No. 08/2021 – Integrated Tax (Rate) dated 30.09.2021 and submitted that at Sr. No. 3(b) the Ministry of Finance, Govt. of India has introduced following renewable energy devices and parts for their manufacturer under Sr. No. 201 A, wherein photovoltaic cells, whether or not assembled in modules or made up into panels are included in schedule II – 12% applicable rate of GST.

2.2.3. Ld. Adv. further referred to the relevant extract of the PPA which are reproduced as under:

*“Article 1: definitions*

*1.1 .....*

*“Bid Deadline” shall mean the last date of submission of bid under RfS No. GUVNL/500MW/Solar(Phase VIII) dated 07.02.2020 and Addendums thereto, if any*

*“Change in Law” Shall have the meaning ascribed thereto in article 9 of this PPA.*

*.....”*

It is submitted that Change in Law events have been occurred after the last date of submissions of bid i.e., 07.03.2020 which resulted in increase in the cost of the project and therefore the same qualify as Change in Law event.

- 2.3. It is further submitted that on, 30.09.2021, 2<sup>nd</sup> Change in Law event came into effect as IGST/GST Rate was originally increased from 5% to 12%. It is undisputed fact that there is increase in the rates of BCD as well as GST.
- 2.4. It is further submitted that the Commission has jurisdiction to decide the present Petition filed for seeking declaration of reliefs on account of Change in Law events as per Clause No. 9.1.1 (a) and (b) of the PPA. It is submitted that the Commission may also be pleased to evolve a suitable compensatory mechanism or to direct the Respondent to follow the mechanism provided under Clause 9.2.1 and 9.2.2 of the PPA. It is further submitted that in order to restitute the Petitioner to the same financial position as if the Change in Law events have not occurred because the Petitioner could not have foreseen / presumed / anticipated the occurrence of the aforesaid Change in Law events during the tendering/ bidding process and the same was not

accounted / factored while submitting the final bid with quoted tariff. Therefore, any increase in cost of the Project as a result of occurrence of any extraneous events being beyond reasonable control of the Petitioner will qualify as an event of Change in Law under the PPA.

2.5. It is further submitted that the Notification No. 01/2011- Customs dated 06.01.2011 issued by the Ministry of Finance, Government of India, that the components required that for the initial setting up of a solar power generation project or facility, when imported into India, the duty of customs leviable thereon which is specified in the First Schedule at the Customs Tariff Act, 1975, as in excess of 5% ad valorem and from the whole of the Additional Duty of Customs leviable thereon under Section 3 of the said Customs Tariff Act. From the said Notification, it is clear that the import of said solar modules were exempted beyond 5%.

2.6. It is further submitted that at the time of bid submission by the Petitioner on 07.03.2020 the Customs Duty on Solar inverters to be levied was 5 % for import of items required for setting up of Solar Power Project at initial stage in terms of the Customs Notification No. 01/2011 - dated 06.01.2011. However, Ministry of Finance, Government of India issued the Customs Notification on 01.02.2021 in which the exemption as granted earlier by virtue of aforesaid Notification was reversed and BCD on Solar Inverter was increased from 5% to 20% vide Notification No. 03/2021 dated 01.02.2021.

2.7. It is further submitted that there was first “Change in Law” through the Notification No. 03/2021- Customs dated 01.02.2021, in Point No. IX of the said Notification at Point No. IX defined the substitution of the Goods other than the solar inverter. So, it was clear that the solar inverter were not to be charged under the Basic Customs Duty. It is further submitted that Central Board of Indirect Taxes, Department of Revenue, Ministry of Finance, Government of India issued the details for levy of the Basic Customs Duty at Entry No. 85 and raised the tariff of BCD at 20% and there is no dispute about this fact in the present Petition.

2.8. It is further submitted that on the issue of levy of GST, it is submitted that under the Notification No. 08/2021 – Integrated Tax (Rate) dated 30.09.2021, there was an insertion of Sr. No. 201 A and at point No. (h) the photovoltaic cells, whether or not assembled in modules or made up into panels were included for 12% applicable rates for GST, the said fact is also undisputed between the parties. So, the rate of GST increased to 12% from earlier rates of GST at 5 %.

2.9. It is further submitted and referred to Clause 9.1.1 of the PPA dated 08.07.2020. It is submitted that the Change in Law clause is applicable on occurrence of events mentioned in it. It is specifically referred in the said clause that if there is any new enactment or modification with respect to any tax or surcharge or cess levied or similar charges by the Competent Court

than the Petitioner is eligible to claim the same. He further referred to Clause 9.1.1 (b) of the PPA which reads as under:

*“ 9.1.1 (b) Introduction / Modification /Changes in rates of Safeguard duty and / or anti dumping duty and / or customs duty which has direct effect on the project cost.”*

From the above, it is clear that if there is any introduction/modification/changes in the rates of Safeguard Duty or Anti-dumping duty and Customs Duty which has direct impact on the Project cost. Hence, in the present case, it is applicable if such event of Change in Law occurs after the bid deadline date.

2.10. It is further submitted that the Article 9.2.1 and 9.2.2 is the Clause where the Change in Law relief is provided to the Petitioner. Hence the Article 9.1.1 is for the event of change in law and the said relief is given under Article 9.2.1 and 9.2.2 applicability of such Change in Law.

2.11. It is further submitted that the Petitioner is to be compensated for occurrence of Change in Law events after submission of the bid date and the Respondent cannot take any undue advantage by not allowing the same. Any deviation/change in the project cost arising out of extraneous circumstances such as issuance of the Custom Notification after the last date of bid submission which is 07.03.2020 in the present case. Such event was being beyond the reasonable control and not being attributable to the Petitioner which has

adversely impacted the financial viability of the Project qualifies as a Change in Law event as provisioned under the Article 9.1.1 (b) of the PPA and the Petitioner is entitled to receive appropriate compensation so as to be restored to the same economic position as if such Change in Law had not occurred. It is further submitted that the Petitioner has already suffered an adverse financial impact of Rs. 4,25,63,066/- on account of same, which has to be compensated to the Petitioner in terms of the PPA along with applicable carrying cost. Accordingly, as per Article 9.2.2 of the PPA, change in tariff due to adverse impact on account of Change in Law event until the date of issuance of the Change in Law notice is Rs. 0.01 per kWh.

3. Ld. Adv. Ranjitha Ramchandran appearing on the behalf of the Respondent submitted that there are two claims filed by the Petitioner in terms of Article 9 of the PPA dated 08.07.2020 entered between the Petitioner and the Respondent. (1) Change in Basic Customs Duty vide Notification dated 01.02.2021 (2) Change in rates of Goods and Service Tax on equipments/parts for solar plants vide Notification dated 30.09.2021. Further, the Petitioner has sought consequential relief in the present Petition.

3.1. It is submitted that issue of Change in Law has to be decided in terms of the PPA. Further, any Change in Law is to be approved by the Commission after consideration of the terms of the PPA with subject to verification of the documents/ evidence and computation. The issue of Change in Law has to be considered in terms of Article 9 of the PPA executed between the parties.

It is also submitted that the aforesaid claims should fall under the Article 9.1.1 of the PPA dated 08.07.2020. The Article 9.1.1 reads as follows:

“.....

*9.1.1. "Change in Law" shall refer to the occurrence of any of the following events after the Bid Deadline.*

*a. The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable on the final output in the form of energy) or sale of electricity.*

.....”

In the above mentioned Article, it is clear that the said claim is related to the generation of electricity only. It is submitted that Article 9 of the PPA is having limited applicability as specified therein and the claim of the Petitioner regarding Basic Customs Duty (BCD) as well as GST is not with regard to generation of electricity leviable on the final output in form of energy or sale of electricity. Accordingly, ‘Change in Law’ declaration sought by the Petitioner is not admissible and cannot be allowed.

3.2. The Change in Law claim can only be considered in terms of Article 9 of the PPA which has a limited scope. It is submitted that Article 9.1.1(a) would not cover any other transactions/levies besides those which have an impact on the final output of electricity, and therefore GST inputs would

not be covered. The claims of Basic Customs Duty and GST are not on generation of electricity by the Petitioner being final output in the form of energy nor on sale of electricity by the Petitioner. In regard to Article 9.1.1 (b), only specific taxes and duties have been considered and that too which have direct effect on project cost. The same does not include GST.

3.3. It is further submitted that there is nothing mentioned about the GST in the said PPA, hence now the Petitioner cannot claim any amount for the Change in the rates of GST from 5% to 12%. It is yet to be ascertained that whether there is impact of the Basic Custom Duty or not on the cost of the project.

3.4. She further referred to Article 9.2.1 of the PPA and stated that it is related to the Article 9.1.1 (a) and similarly, Article 9.2.2 is related to the Article 9.1.1 (b).

By referring to the above Articles, she submitted that there is specifically mentioned in Article 9.2.1 that due to the Change in Law on account of Article 9.1.1 (a) results in the power producers cost which is attributable to the project cost being decreased or increased by 1% (one percent) of the estimated revenue from the electricity for the contract year for which such adjustment become applicable in tariff payment by increased or decreased with approval of the Commission more during the operation period to the power producer. Hence, the Petitioner is not entitled to the said benefit due to Change in Law. It is further submitted that the reference to the cost of the Solar PV Modules are not mentioned. She also submitted that there is

separate formula provided under the PPA for calculation of the claims for Change in Law cases.

- 3.5. The fact that Article 9.1 state limited in scope of Change in Law. It is also clear from Article 9.2 which provides relief in case of Change in Law. Article 9.2.1 dealing with relief for Article 9.1.1(a) recognises that the relief is "during operation period". There is no such provision for construction period which means that the relief for Change in Law is limited to operation period only. The taxes and duties on inputs would not be covered. Article 9.2.2 state to provide proof of payment towards specific duties such as Safeguard Duty/ Anti-Dumping Duty/Customs Duty and does not include GST.
- 3.6. She submitted that the Petitioner has not filed the certification and necessary documents in support of its claim on record for determining its claim and the Practising Chartered Accountant Certificate submitted is also not in the required format.
- 3.7. She further submitted that in regard to the Article 9.1.1(b)of the PPA which would relate to construction period, there is a specific formula under Article 9.2.2 and the formula therein includes all aspects including the aspects of interest. The said formula was part of the bid terms based on which the competitive bidding was held and the Petitioner was selected. The Petitioner had solemnly agreed to the above mechanism. The PPA does not provide for any additional or other compensation. The Petitioner is to be

compensated by way of increase in tariff in terms of the formula specified under Article 9.2.2 only and not in any other manner.

- 3.8. She further submitted that there is no restitutionary provision in the PPA for the carrying cost being claimed by the Petitioner. The Petitioner has claimed restitution of the same economic position which cannot be allowed as the PPA has no provision for the same. On the claim of the carrying cost, she referred to the Judgement dated 13.04.2018 of Hon. APTEL in Adani Power Ltd. Vs. Central Electricity Regulatory Commission & Ors in Appeal No. 210 of 2017, wherein the Hon. APTEL has examined the similar 'Change in Law' provision which was under Article 13 of the PPA dated 06.02.2007. In the said case the claim of 'Change in Law' was in relation to the levy of the Duty under the Customs Act, Central Excise etc. on procurement of goods and services and the Central Commission had not allowed the Change in Law as sought by the Appellant. She referred to Article 13.1.1 of the PPA in the Adani's case before the Hon. APTEL and submitted that there was Change in Law with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on water, primary fuel used by the generating plant, the generation of the electricity (leviable on the final output in the form of energy), sale of electricity. It is similar to the present case. The Hon. APTEL in the said matter upheld the decision of the CERC and held that once the PPA is entered into between the parties pursuant to the competitive bidding, the rights and obligations of the parties are to be seen in terms of the agreed PPA. In the said case the specific provisions of Gujarat

Bid – 01 PPA related to applicability of Change in Law, the CERC had not allowed the reimbursement of impact of levy of duties under the Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1985 on impact of procurement of goods and service tax on the taxable services for the supply of power. So, the Central Commission had in the said case specifically refused to grant the relief of Change in Law. The said Judgement has also covered the issue of carrying cost raised by the Appellant.

3.9. She further submitted that it is well settled principle of construction of the contract that the intention of the parties must be gathered from the language used in the contract. The cardinal principle to ascertain intent of the parties to the contract is through the words which are used in the contract. The natural, ordinary and sensitive meaning to the language through which the parties have expressed themselves, unless the meaning leads to absurdity, provides the guidance for finding out the intent of the parties. In this regard she referred to the Judgement of Hon. Supreme Court of India in ONGC Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC 705.

3.10. She further submitted that once the PPA is signed between the parties, the PPA is the only governing document and the guidelines cannot be considered. On the claim of the Petitioner for the carrying cost, she submitted that the PPA in the present case does not have any provision entitling the Petitioner for carrying cost due to the implications of the

Change in Law. The relief of Change in Law is limited to Article 9.2 and there can be no further claim. Also, there is a formula as consequence for Change in Law and there is no other relief or principle of restitution or otherwise any other provisions in the PPA.

3.11. She further submitted that the Judgement of the Hon. APTEL dated 13.04.2018 in Appeal No. 210 of 2017 was challenged before the Hon. Supreme Court of India and the said Judgement was upheld vide Judgement dated 25.02.2019 in Civil Appeal No. 5865 of 2018 in the case of Uttar Haryana Bijli Vitran Nigam Limited and Anr. Vs. Adani Power Limited & Ors. In the present case there are no provisions of restitution/restoration to the same economic position and therefore the Petitioner is not entitled to any carrying cost.

4. In response to the contentions raised by the Respondent, Ld. Adv. of the Petitioner submitted the interpretation that the Respondent has given, will make the entire Article 9 redundant. He submitted that all the taxes and duty paid are in the construction period of the Project. There is no dispute on enactment of law, hence he emphasised on Article 9.1.1 (a) of the PPA wherein, it is mentioned that any change with respect to any taxes or surcharge or cess levied etc. that are charged by the Competent Government on equipments of project which increase project cost and reflected as generation of electricity which is leviable on the final output in the form of energy or sale of electricity. So, all the costs are capital in nature which are for the project itself are covered

in the input costs. The contention of the Respondent that any changes with respect to GST would be covered, if it is on output of plant i.e. generation of electricity is not valid.

4.1. It is submitted that the Hon. APTEL in Appeal No.111 of 2017 in M/s. GMR Warora Energy Limited v. CERC and Ors., it is held that any tax levied through an Act of Parliament after the cut-off date which results in additional expenditure, the same is covered as Change in Law. In the said Judgement, it has also been 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 licensee. Further, the CERC vide its Order dated 09.10.2018, while interpreting similar provision under a power purchase agreement has held that supply of power covers the cost of inputs required for generation of power and any tax or application of new tax on supply of power to the taxes on inputs required for such generation and supply of power to the distribution licensee. By virtue of issuance of GST Notification is an events of Change in Law which covered under the Article 9.1.1(a) of the PPA.

4.2. It is further referred to Order dated 14.08.2018 in Appeal No.111 of 2017 in M/s. GMR Warora Energy Limited v. CERC and Ors. in which Para 13 of the Order which states regarding Article 10 which relates to Change in Law, and submitted that Hon. APTEL has decided that any tax or application of new tax on supply of power also covers the taxes on inputs cost of the project which reflect in generation and supply of power to the distribution licensee.

It is further relied upon the conclusion made at Para 41 of the said Order and submitted that the said observation is applicable to the present case of the Petitioner.

- 4.3. It is further relied on the Judgement of the Hon'ble Supreme court in Nabha Power Ltd. Vs. Punjab State Power Corporation Ltd, and Ors. in (2018) 11 SCC 508. It is submitted that the Principle of business efficacy has been discussed in detail. It has been observed by Hon'ble Supreme Court that business efficacy and practically it is applied by the courts to determine whether a term should be implied into a contract for it being so obvious, even through that term was not written into the contract expressly.
- 4.4. Further relying on the Para 49 of the said Order, it is submitted that the explicit terms of the contract are always final word with regard to the intention of the Co-party. The PPA signed with the Respondent is not silent and it has expressed the wording therefore, the Petitioner is entitled to any increase in the cost of the project by way of Change in Law Clause. Relying on the above Judgement, it is submitted that the reliefs sought in the present Petition is not contradicting any terms of the contract, barring the present Change in Law claim.
- 4.5. It is further relied on the Judgement in Appeal No. 256 of 2019 in Parampujya Solar Energy Pvt. Ltd. and Ors. vs. CERC, Judgement wherein the Hon. APTEL has held that Change in Law Clauses in the PPAs assure relief to be provided in relation to any additionally recurring/non recurring

expenditure arising out of Change in Law. There is no restriction in the contracts as to application to this Clause for the period prior to COD. In this case submission made by the Respondent is wrong since Change in Law event has occurred and additional cost have been incurred prior to COD of the project.

- 4.6. It is further submitted that there is no base for the Respondent to negate the claims of the Petitioner. In case the PPA is silent on the compensation methodology the discretion to formulate the same is with the Commission and the Petitioner is entitled to receive the carrying cost. The Petitioner is entitled to carrying cost as a matter of Right and also allowed under the PPA. Further, the Hon'ble Supreme Court in Vidarbha Industries Power Limited Vs. Axis Bank Limited (2022) 8 SCC 352 has held that any compensation to be granted to a party must take into consideration the principle of time value of money which should be maintained by granting compounding interest and inflationary interest. He further referred to the Appeal No. 256 of 2019 in Parampujya Solar Energy Pvt. Ltd. and Ors. vs. CERC, and submitted that while referring to aforesaid law settled by Hon'ble Supreme Court has held that the purpose of the Change in Law clause in the PPAs is to relieve the developer of the additional burden and the developer should be entitled to claim carrying cost over and above the Principal claim raised for the time value of money. He further submitted that nature in Change in Law relief under the PPA is restitutionary in nature and not dependent upon specific restitution clause under the PPA.

- 4.7. It is further relied on the Hon. Supreme Court Judgement of Shivashakti Sugar Ltd. Vs. Shree Renuka Sugar Limited, (2017) 7 SCC 729, sets out the need for business efficacy and the importance of applying both law and economics while examining various contractual facets. Applying the principle in the above decision to the present case, Ld. Adv. pointed out that financial impact on the Petitioner will be huge, if the compensation towards the additional cost incurred on account of Change in Law event, if it is denied. It is further submitted that PPA is a standard form agreement, provisions of PPA are to be interpreted in accordance with business efficacy and commercial parliance.
- 4.8. It is further referred to the Para 21 of the Judgement of Hon'ble Supreme Court in case of Uttar Haryana Bijli Vitran Nigam Ltd. and submitted that in the said Judgement the Hon. Supreme Court has granted the interest on carrying cost. It is further submitted that interest on carrying cost is nothing but the time value of money and the only manner in which the party can be accorded the benefit of restitution in every which way.
- 4.9. It is further referred to the Judgement of Hon. Supreme Court of India (2011), 8 SCC 16 in Indian Council for Envrio Legal Action Vs. Union of India and Ors. referring to the Para No. 160, 161, and 167, the Ld. Adv. of the Petitioner submitted that the Hon. Supreme Court ruled that compensation ought to be granted on compound interest basis as it takes into account the

time value of money and inflationary measures which is the true spirit of restitution to the affected party.

4.10. Ld. Adv. of the Petitioner referring to the aforesaid submissions submitted that the PPA executed with the Respondent squarely covers the express provisions and therefore the cost incurred is eligible for recovery and needs to be compensated by the Respondent. Further referring to Article 9.1.1 (b) of the PPA, it is submitted that the Petitioner is entitled for any increase rate of GST on imports of inverter for the aforesaid project.

4.11. It is submitted that the events mentioned in the present Petition being beyond the reasonable control and not being attributable to the Petitioner and adversely impacted the financial viability of the power project qualifies as a Change in Law events. Considering the cost has been incurred at the project development stage, relief for Change in Law events under Article 9 of the PPA may be granted and the Petitioner be restituted the same economic position as if no Change in Law event has occurred.

4.12. The Petitioner further submitted that the officers of their company are ready for providing any further supporting documents/details and reconciliation of the said documents with the Respondent. if the Commission permits.

5. In response to the submissions of the Petitioner, Ld. Adv. of the Respondent submitted that the aspect of Change in Law was also clarified in the pre-bid

meeting wherein the suggestion of the Petitioner and others to remove the restriction of Change in Law clause only on sale of electricity in the context of Article 9.1.1 (a) and expanding the scope of Article 9.1.1 (b) was not accepted and further it was clarified that the bidder has to consider all other factors while quoting their bids and no liability shall arise on the Respondent due to such other factors. The Petitioner/bidders were all aware prior to the bid that the Change in Law to be considered under the PPA was specific and restricted and no other claim can be raised.

5.1. It is further submitted that M/s. Juniper Green Petitioner has requested to delete the clause No. 1.2.3 of the RfS. which reads as under

*“Clause 1.2.3 The bidders will be free to avail physical incentives like accelerated depreciation, concessional customs and excise duty, tax holidays, benefits from trading of carbon credits etc. as available for such projects the same will not have any bearing on comparison of bids for selection. As equal opportunity is being provided to all bidders at the time of tendering itself, it is upto the bidders to avail various tax and other benefits. No claim shall arise from GUVNL for any liability if bidders are not able to avail fiscal incentives and this will not have any bearing on the applicable tariff.”*

In reply to the same the Respondent GUVNL has filed the reply as under:

*“ As per Clause 9.1.1 of the PPA withdrawal of exemption from customs duty, if notified after bid deadline shall be considered as change in law. No change is required”.*

5.2. It is submitted that in the pre-bid meeting the objectors had requested and proposed the Clause No. 9.1.1 (b) of the RfS. The Clause 9.1.1 (b) reads as under:

*“Introduction/modification/change in rates of safeguard duty and/or anti dumping duty and/or Customs Duty which has direct effect on project cost”.*

The Objector has made proposal for Change in Law provisions in the pre bid meeting which is as under:

*“Introduction/modification/change in rate of any taxes/ duties/ sales/ surcharge or similar charges on import of solar power equipment or parts thereof ~~safeguard duty and/or anti dumping duty and / or Customs Duty~~ which has direct effect on the project cost.*

The Respondent GUVNL had filed the reply against the request of the objector which is as under:

*“The change in law provisions of the PPA have been provided to reduce the risk/ uncertainty emanating from major factors such as Anti Dumping Duty, Safeguard Duty, Customs Duty, etc. Further, the imposition of tax or Surcharge or levies on generation of electricity (leviable on the final output in the form of energy) or sale of electricity is also covered under change in law as per PPA provisions. Bidder has to factor in all other changes while quoting their bids and no liability shall arise on GUVNL due to such other changes. It is hereby clarified that social welfare surcharge if applicable on Basic Customs Duty shall be allowed as pass through under Change in Law by GUVNL”.*

From the above, it is submitted that the aforesaid response is a part of addendum to the PPA and it is clear that all parties had proceeded on the basis that the Change in Law is restricted in a particular and GST would not be covered on the same and the bidders had to factor any such consideration. One of the bidder had specifically raised the issue of GST and

stated that the same would not be covered under the current definition of Change in Law. In this regard, the Respondent GUVNL had clarified that only specific taxes are included and there is no change to be made to the PPA. Thus the PPA clause does not include GST.

5.3. The Petitioner itself had contended that the Clause has to be seen from the intention of the parties but when the intention was pointed out in view of the pre-bid clarification wherein the Petitioner itself had stated that current definition of Change in Law would not cover GST, the Petitioner had sought to contend that the same has to be interpreted by the Court. Even otherwise, the interpretation of the court as prevailing on bid deadline date was that, such Clauses would be limited in scope.

5.4. The Petitioner has sought to rely on the heading of Article 9.2 "relief". It is submitted that when the PPA provides for a specific formula for computing the impact of Change in Law under construction period under Article 9.2.1, there cannot be any further consideration by relying on other terms. The mere mentioning of the term "Relief for Change in Law" as the heading to Article 9.2 cannot be used to broaden the scope of the said formula. The reference to "relief" in the heading is not the same as the provision in the PPA considered in Appeal No. 256 of 2019 which was "to provide relief" in the substantive clause of the PPA being Article 12.1.1 and 12.2.2 and which the Hon'ble Tribunal has interpreted as open ended provision. The above is completely different from reference to relief in the heading of Article 9.2 and

further is different than Article 9.2.2 which deals with the consideration of impact of Change in Law in construction period. Unlike the above provision, the provision in the present PPA is not open ended.

5.5. The intention in the present case is clear not only from the terms of the PPA but the Order dated 15.03.2018 in Petition No. 1706 of 2018 passed by the Commission in relation to Change in Law clause (as per Article 9.1.1 (a)) as well as the pre-bid clarification. In the Order dated 15.03.2018, the Commission had approved the Change in Law such as Article 9.1.1 (a) in the present case on the basis that allowing Change in Law during construction period as per Clause 5.7.2 of the Guidelines would lead to excessive litigations and complications and it was noted that the clause was in relation to operation period. The Commission had specifically discussed and upheld the restriction and limitation of the Change in Law clause to the operation period and upheld the exclusion of the Change in Law for construction period. Further, the above interpretation is also in keeping with the interpretation of the Hon'ble Tribunal in Appeal No. 210 of 2017 dated 13.04.2018 in case of PPA with Adani Power Limited. Both these Judgments/Orders were in existence at the time of bid deadline date and therefore the bidders even in the present case, were aware of the interpretation of the Change in Law clause under Article 9.1.1 (a). It is thus clear that Respondent GUVNL had intended that the present PPA would not cover the changes in construction period except for the certain specific events provided in Article 9.1.1 (b) and this was accepted by all bidders. This was also the interpretation of the

bidders, and in fact of the Petitioner in particular, which is clear from the pre-bid meetings.

5.6. The Petitioner has sought to rely on decision of the Hon'ble Tribunal in GMR Warora Energy Limited v. CERC in Appeal No. 111 of 2017 dated 14.08.2018. The Petitioner has sought to rely on the above decision for the interpretation of the clause in the Change in Law for supply of power. The Petitioner is claiming that the said Judgment was existing at the time of the bid submission; however this is clearly an afterthought and the Petitioner had not considered the said Judgment to be applicable on the date of bid submission, since the Petitioner itself had raised the issue that the Change in Law clause would not cover GST during the pre-bid conference. There was no reason to seek any change in the clause if the interpretation of the clause already included the GST. The Petitioner is raising such issues as an afterthought to claim undue gains and tariff which is contrary to consumer interest and the purpose of bid.

6. Heard the parties. We note that the present Petition is filed by the Petitioner for seeking declaration of Change in Law in regard to change in Basic Customs Duty (BCD) vide Notifications dated 01.02.2021 and Change in rate of Goods and Service Tax on Solar Modules and other solar power generator equipments vide Notification dated 30.09.2021 under the PPA dated 08.07.2020 entered into between the parties for supply of power from the Petitioner's 190 MW Solar PV Plant in the State of Gujarat.

7. We also note that during the hearing, in response to the query of the Commission about the documents to be submitted by the Petitioner which are essential to decide the matter and confirmation of the aforesaid details submitted by it and file pending documents, if any, on affidavit regarding submissions of pending documents, both the parties have fairly agreed to submit the same.
8. We also note that the Respondent has sought certain documents from the Petitioner for ascertaining its claim for Change in Law and the Petitioner has agreed to provide the same. We note that the below mentioned relevant documents are essential to be filed by the Petitioner in support of claim made by it and verification of the same by the Respondent.
- (i) Invoices and documents showing payment of BCD clear co-relation between the project, supply of goods/ services and invoices raised backed by Auditor's certificate. This includes invoices or documents providing the payment of BCD and GST.
- (a) Copy of relevant supply agreements entered by the Petitioner for supply of solar PV modules with supplier of modules, inverter etc..
- (b) Copies of invoices of all solar modules, inverter etc. imported by the Petitioner.
- (c) Details of BCD and GST payment challan as well as Bank Statement.
- (d) Details of BCD and taxes paid.

- (e) Details of interest cost alongwith debt.
- (f) Bill of lading for proof of quantity both the master and house bill of lading.
- (g) Packing list.
- (h) Invoice.
- (i) Custom accessed copy of bill of entry.
- (j). Customs out of charge order.
- (k) Marine insurance for sea and island transit.
- (l) Copy of LRs for inland transport from port to projects site and E-way bill.
- (m) Practicing Chartered Accountant certificate substantiating and supporting the claim of the Petitioner for the supply of Solar PV modules.
- (n) Certificate from an Independent Engineer certifying that the modules that have been imported have actually been installed at the project.
- (o) RFID Details.
- (p) Detailed calculation sheet with BCD calculation.
- (q) CEIG approvals and supporting documents
- (r) Commissioning Certificate stating number of modules installed on which BCD was paid along with completion of transmission network, works of the line, bays, transmission etc. at connectivity sub-station.
- (s) Details of interest cost along with details of debt.

(ii) Documents for GST needs to provide are as under:

- (a) Proof of payment under GST.
- (b) GST receipt.
- (c) Form GSTR – 1.
- (d) Form GSTR – 3B (on revenue side).
- (e) GSTR – 2A (on purchase side).
- (f) Statuary Auditor Certificate
- (g) Copy of GSTR – 1 and GSTR – 3 B of vendors.
- (h) Confirmation certificate from vendors.
- (i) Relevant extract of GST Returns of vendors for the claim period.
- (j) Auditor's certificate supportive of GST payment made to vendors and reflecting in the Auditors certificate provided by the Petitioner to the Respondent.
- (k) Detail of increase/ decrease in tax/duties liabilities supported by Auditor's certificate regarding GST differential rates on various items and services and taxes.
- (l) Details of components and applicable taxes: Submission of detail of each component and the tax applicable along with sample invoices demonstrating the claim for compensation.

9. We direct the Petitioner to submit details of documents establishing one to one corelationship of BCD and IGST/GST paid etc., solar modules/ Solar Inverters

imported for commissioning in the power plant, in chart as well as tabular formats within 3 week's time. The Petitioner is also directed to provide copy of the above documents to the Respondent. The Respondent will submit its response, if any, within two weeks time from the receipt of details from the Respondent.

10. The next date of hearing would be intimated separately.

11. Order accordingly.

**Sd/-**  
**(S. R. Pandey)**  
**Member**

**Sd/-**  
**(Mehul M. Gandhi)**  
**Member**

**Sd/-**  
**(Anil Mukim)**  
**Chairman**

Place: Gandhinagar  
Date: 07/08/ 2024.

