CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No: 155/MP/2012

Coram:
Dr. Pramod Deo, Chairperson
Shri S. Jayaraman, Member
Shri V.S. Verma, Member
Shri M. Deena Dayalan, Member

Date last hearing: 12.02.2013
Date of Order : 02.04.2013

In the matter of:
Application under Section 79 of the Electricity Act, 2003 for evolving a mechanism for regulating including changing and/or revising tariff on account of frustration and/or of occurrence of *"force majeure"* (Article 12) and/or "change in law" (Article 13) events under the PPAs due to change in circumstances for the allotment of domestic coal by GOI-CIL and enactment of new coal pricing Regulation by Indonesian Government.

And
In the matter of:
Adani Power Limited, Ahmedabad Petitioner

Vs.

1. Uttar Haryana Bijli Vitaran Nigam Ltd.
2. Dakshin Haryana Bijli Vitaran Nigam Ltd.
   through
   Haryana Power Purchase Centre, Panchkula
3. Gujarat Urja Vikas Nigam Ltd., Vadodara Respondents

Counsel/Parties appeared

Shri CS Vaidyanathan, Senior Advocate
Shri Amit Kapur, Advocate, APL
Shri Vikram Nankani, Advocate, APL
Ms Poonam, Advocate, APL
Shri Gautam Shahi, Advocate, APL
Ms Shruti Sabharwal, Advocate, APL
Shri M G Ramachandaran, Advocate, UHBVN/DHBVN and GUVNL
Ms Swapna Seshadari, Advocate, UHBVN/DHBVN and GUVNL

Shri Jatin Jalundhwala, APL
Shri Malav Deliwala, APL
Shri Kandrap Patel, APL
Shri Paritosh, APL
Shri Sandeep Somsetty, APL

Per Dr. Pramod Deo, Chairperson, Shri V.S. Verma, Member, Shri M. Deena Dayalan, Member

ORDER

In the present petition, the petitioner, Adani Power Limited has made the following prayers in regard to the Power Purchase Agreements (PPAs) signed by it with the utilities in the States of Gujarat and Haryana:

"a) to evolve a mechanism to restore the Applicant to the same economic condition prior to occurrence of Subsequent Events mentioned in respective Part I & II hereinabove by adjudicating the disputes between the Applicant and the Respondent(s) in relation to regulate including changing and/or revising the price/tariff under PPAs dated 7.8.2008 with UHBVNL and DHBVNL and 2.2.2007 with GUVNL;

b) in the alternative, to declare that the Applicant is discharged from the performance of the PPAs on account of frustration of the PPAs due to Subsequent Events in respective Part I & II;

c) this Hon'ble Central Commission be pleased to declare that the revised tariff shall be applicable from the Scheduled Commercial Operation Date (SCoD) of the PPAs;

d) that during the pendency of the present Application Hon'ble Central Commission may direct the Respondent(s) to procure power on the cost plus basis, alternatively, the Hon'ble Central Commission may suspend the operation of the PPAs till the final disposal of the Application;

e) pass such further or other orders as the Hon'ble Central Commission may deem just and proper in the circumstances of the case."

<u>Facts of the Case</u>

2. The petitioner, a subsidiary of Adani Enterprises Ltd, has set up a generating station, Mundra Power Project, with a total capacity of 4620 MW in the Special Economic Zone at Mundra in the State of Gujarat. The generating station has four phases, namely, Phase I & II comprising Unit Nos. 1 to 4 (4x330 MW), Phase III comprising Unit Nos. 5 and 6 (2x660 MW) and Phase IV comprising Unit Nos.7 to 9 (3x660 MW). The petitioner has entered into two PPAs dated 2.2.2007 and 6.2.2007 for supply of 2X1000 MW power to Gujarat Urja Vikas Nigam Limited (GUVNL) each from Phase I &II and from Phase III and PPA dated 7.8.2008 with Uttar Haryana Bijli Vidyut Nigam Ltd and Dakshin Haryana Bijli Vidyut Nigam Ltd (Haryana Utilities) for supply of 1424 MW power from Phase IV of the generating station. The present petition is concerned with the sale of power through PPA dated 2.2.2007 to GUVNL and PPA dated 7.8.2008 to the Haryana Utilities.

(A) PPA dated 2.2.2007 with GUVNL

3. On 1.2.2006, the third respondent, Gujarat Urja Vikas Nigam Ltd issued a public notice inviting proposals for supply of power on long-term basis under three different competitive bid processes denoted as Bid No 01, Bid No 02 and Bid No 03. Gujarat Electricity Regulatory Commission (GERC) approved the bidding documents on 13.3.2006. Request for Proposal (RfP) was issued by GUVNL on 24.11.2006. In accordance with clause 3.1.3 of the RfP for Bid No.2, the seller was required to assume full responsibility to tie up the fuel

linkage and to set up the infrastructure requirement for fuel transport and its storage. According to clause 4.1.1 of the RfP, the bidder was required to indicate the progress/proof of fuel arrangements. In response to the notice for Bid No. 2, bids were received from seven bidders including the Consortium of Adani Enterprises Ltd and Vishal Exports Overseas Ltd (hereafter 'the Consortium'). The Consortium which was proposing to set up a 1200 MW plant based on indigenous coal/washed coal/blended coal in the State of Chhatishgarh submitted the bid dated 4.1.2007 for 1000 MW quoting a levelised tariff of ₹2.3495/kWh (₹1/kWh as the capacity charge and ₹1.3495/kWh as non-escalable energy charge). In the bid, the Consortium had indicated that the lead member, Adani Enterprises Ltd. had tied up the indigenous coal requirement of the project with Gujarat Mineral Development Corporation (GMDC) which had been allotted Morga II coal block in the State of Chhatisgarh. It was further indicated that with a view to ensure supply of fuel with optimum techno-commercial parameters, Adani Enterprises Ltd. had tied up for supply of imported coal with M/s Coal Orbis Trading GMBH, Germany and M/s Kowa Company Ltd., Japan and executed separate MoUs with them dated 9.9.2006 and 21.12.2006 respectively. In the bid it was indicated that the bidder was also evaluating Mundra as an alternate project site with blended/imported/washed coal and the quoted tariff including transmission charges, losses and other costs would remain the same. In support of the proof of fuel arrangement, the Consortium annexed with the bid a copy of letter dated 14.11.2006 issued by GMDC and MoUs with Kowa

Company Ltd, Japan and Coal Orbis Trading GMBH, Germany. The Consortium was selected as the successful bidder and the Letter of Intent dated 11.1.2007 was issued in its favour. The Power Purchase Agreement (PPA) dated 2.2.2007 for supply of 1000 MW of power at the rate quoted in the bid was signed between GUVNL and the Adani Power Private Limited as the Special Purpose Vehicle of the Consortium. Though initially it was agreed that the petitioner would supply power from the power project which was being set up at Korba in Chhattisgarh State, the petitioner made a proposal to GUVNL in its letters dated 12.2.2007 and 20.2.2007 to supply power from its Mundra Power Project. Subsequently, a supplementary PPA was signed on 18.4.2007 between the petitioner and GUVNL for supply of 1000 MW power from Units 5 and 6 (Phase III) of Mundra Power Project instead of the power project in Chhatisgarh. At the instance of GUVNL, GERC adopted the tariff under Section 63 of the Electricity Act, 2003 (hereinafter “the Act”) on 20.12.2007 and also approved the PPA under clause (b) of sub-section (1) of Section 86 of the Act.

4. The petitioner's MoU dated 21.12.2006 with the Kowa Company Ltd, Japan and the MoU dated 9.9.2006 with Coal Orbis Trading GMBH, Germany were terminated on 5.2.2008 and 18.3.2008 respectively as the Fuel Supply Agreements were not executed. Thereafter, the petitioner executed a Coal Supply Agreement with Adani Enterprises Limited on 24.3.2008 for purchase of coal with GCV of 5200 kcal/kg at price of USD 36/MT for Phase III units of

Mundra Power Project. As regards the commitment of Gujarat Mineral Development Corporation to supply coal to the petitioner from Morga II mines, the petitioner and GUVNL got into dispute with regard to the rate of supply of power and though coal was allocated by GMDC to the petitioner from Naini coal mines in the State of Odisha, the Fuel Supply Agreement (FSA) could not be entered due to persistent difference between the petitioner, GMDC and GUVNL. On account of non-fulfilment of conditions subsequent in accordance with the PPA due to non-materialisation of Fuel Supply Agreement for Phase III of the project, the petitioner gave a termination notice dated 28.12.2009 to GUVNL for termination of the PPA dated 2.2.2007 to be effective from 4.1.2010. Against the termination notice, GUVNL filed a petition before GERC and in order dated 31.8.2010, GERC set aside the termination notice on the ground that the PPA dated 2.2.2007 is not dependent on the fuel supply by GMDC or any other particular source and also for the reason that the petitioner had a Fuel Supply Agreement with Adani Enterprises Limited for supply of imported coal for Mundra Power Project Phase III. The petitioner challenged the said order in the Appellate Tribunal for Electricity in Appeal No.184/2010 and the Appellate Tribunal in its judgement dated 7.9.2011 held that the PPA dated 2.2.2007 was not based on the premise of availability of coal from GMDC and the conditions subsequent contained in Article 3.1.2 of the PPA with regard to fuel supply agreement was duly satisfied with firming up the coal supplies from Indonesian mines and upheld the order of GERC. The petitioner has challenged the judgement in the Supreme Court in Civil

Appeal No. 11133 of 2011.The petitioner is stated to be supplying power from Mundra Power Project Phase III of the generating station in compliance with the directions of Appellate Tribunal from the date of commercial operation on 2.2.2012 by using the imported coal from Indonesia purchased through Adani Enterprises Limited.

<u>PPA dated 7.8.2008 with Haryana Utilities</u>

5. Haryana Electricity Regulatory Commission (HERC) approved the bidding documents for Case 1 bidding for procurement of electricity under three different bids which was initiated by Haryana Power Generation Company Ltd (HPGCL) on behalf of Uttar Haryana Bijli Vitaran Nigam Ltd (UHBVNL) and Dakshin Haryana Bijli Vitaran Nigam Ltd (DHBVNL) (collectively referred to as 'the Haryana utilities'). On 25.5.2006, HPGCL issued a Request for Qualification to procure 2000 MW of power on long-term basis on behalf of Haryana Utilities. In clause 2.1.5 of the RfQ, it has been mentioned that "the Bidder shall submit a comfort letter from a fuel supplier for fuel linkage for the entire term of the PPA (excluding the construction period) at the time of submission of proposal in response to the RfP". On 4.6.2007, HPGCL issued the Request for Proposals (RfP) document to the qualified bidders, including the petitioner. In clause 7 of the RfP, it has been provided that bidders are required to indicate the progress/proof of fuel arrangement through submission of copies of one or more of the documents, viz. linkage letter from fuel supplier, Fuel Supply Agreement between Bidder and Fuel

Supplier, coal block allocation letter or in-principle approval for allocation of captive block from Ministry of Coal etc. On 4.6.2007, HPGCL issued the Request for Proposals (RfP) document to the qualified bidders, including the petitioner. In the RfP, the bidders were required to indicate the details of fuel on "Format 4: Characteristics of the Representative Fuel". The petitioner on 24.11.2007 submitted the bid for supply of 1425 MW of power at levelised tariff of ₹2.94/kWh (₹0.977/kWh as the capacity charge and ₹1.963/kWh as the energy charge) from Units 7, 8 and 9 (Phase IV) of Mundra Power Project. In Format 4, the petitioner indicated the representative fuel as coal and the fuel type as "Imported/Indigenous Coal". In support of the fuel linkage, the petitioner submitted the copies of the MoUs dated 9.9.2006 and 21.12.2006 between Adani Enterprises Ltd and M/s Coal Orbis Trading GMBH and Kowa Company Ltd, Japan respectively. The petitioner was declared as successful bidder and LoI was issued 17.7.2008. Accordingly, two separate PPAs dated 7.8.2008 were executed by the petitioner with UHBVNL and DHBVNL for supply of 712 MW of power to each from Phase IV of the Mundra Power Project. Haryana Electricity Regulatory Commission at the instance of UHBVNL/DHBVNL adopted the tariff under Section 63 of the Electricity Act on 31.7.2008.

6. The petitioner had made an application on 28.1.2008 to the Standing Linkage Committee (Long Term), Ministry of Coal, Government of India for long term coal linkage. The Standing Linkage Committee (Long Term) {(hereinafter "SLC(LT)} in its meeting held on 12.11.2008 decided that projects

considered as coastal projects would have an import component of 30% for which the developer had to tie up sources directly and Letter of Assurance would be issued for 70% of the recommended capacity only. Accordingly, SLC (LT) authorized issuance of LOA by Coal India Limited for capacity of 1386 MW for Phase IV of the project (70% of installed capacity of 1980 MW) in accordance with the provisions of New Coal Distribution Policy. The petitioner got a letter of assurance from Mahanadi Coal Field Ltd. vide its letter dated 25.6.2009 for 6.409 Million MT per annum which corresponded to 70% of fuel requirement of Phase IV of the project. The petitioner in its letter dated 23.9.2009 addressed to Haryana Power Purchase Centre, the authorized representative of Haryana Utilities, informed that LoA had been received by it from Mahanadi Coalfield Limited for supply of indigenous coal equivalent to 70% of its coal requirement and for the balance, it was proposed to use the imported coal from the petitioner's mines in Indonesia. The petitioner entered into a Coal Supply Agreement (CSA) dated 9.6.2012 for supply of annual contracted quantity of 64.05 lakh Tonnes of coal per annum for a period of 20 years with Mahanadi Coalfields Ltd. As per Schedule VII of the CSA, supply of coal under CSA from domestic sources is not likely to exceed 80% of annual contracted quantity and balance 20% shall be sourced through import subject to confirmation by the petitioner either to accept the supply through import or to surrender the required annual contracted quantity. The petitioner has exercised its option to accept 20% of annual contracted quantity through import.

7. After termination of the AEL's MoU dated 21.12.2006 with the Kowa Company Ltd, Japan and the MoU dated 9.9.2006 with Coal Orbis Trading GMBH, Germany, the petitioner executed a Coal Supply Agreement with Adani Enterprises Limited on 15.4.2008 for purchase of coal with GCV of 5200 kcal/kg at price of USD 36/MT for Phase IV units of Mundra Power Project. Adani Enterprises Limited had floated a Singapore based subsidiary, PT Adani Global which had acquired mining rights in the Bunyu mines in Indonesia. On 14.12.2009, an FSA was executed between PT Adani Global and PT Dua Samudera Perkasa for supply of 10 MTPA of coal at price of USD30-35/MT depending upon GCV of coal to meet the petitioner's requirements.

8. On 26.7.2010, Adani Enterprises Ltd. entered into a Consolidated Coal Supply Agreement with Adani Power Ltd. which replaced the CSA dated 8.12.2006 (for Phase- I and II), CSA dated 24.3.2008 (for Phase- III) and CSA dated 15.4.2008 (for Phase- IV). The Consolidated Coal Supply Agreement provided for supply of 10 MMT of coal per annum at CIF USD 36/MT for a period of 15 years from the scheduled commercial operation date of last unit of Phase IV of the project.

9. On 23.9.2010, Minister of Energy and Mineral Resources, Republic of Indonesia promulgated "Regulation of Ministry of Energy and Mineral Resources No.17 of 2010" (hereinafter referred to as "Indonesian

Regulations). Article 2 of the Indonesian Regulations provides that the holders of the mining permits and special mining permits for production and operation of mineral and coal mines shall be obliged to sell the minerals and coals by referring to the benchmark price either for domestic sales or exports, including to its affiliated business entities. As per Article 11 of the Indonesian Regulations, the Director General on behalf of the Minister shall set a benchmark price of coal on monthly basis based on a formula that refers to the average price index of coal in accordance with the market mechanism and/or in accordance with the prices generally accepted in the international market. The Indonesian Regulations recognizes direct sale contract (spot) and term sale contract (long term) which have been signed by the holders of mining permits and special mining permits and further provides that the existing direct sale contracts and term sales contracts shall adjust to the regulations within a period not later than 6 months and 12 months respectively. In case of violation, the holders of mining permits and special mining permits are liable for administrative sanction in the form of written warning, temporary suspension of sales or revocation of mining operations permits.

10. After promulgation of Indonesian Regulations, Adani Enterprise Ltd has written a letter dated 27.9.2010 to the petitioner expressing its inability to perform its obligations under the CSA dated 26.7.2010 w.e.f 24.9.2011. Also PT Dua Samudera Perkasa in its letter dated 20.9.2011 addressed to Adani

Global PTE Ltd, subsidiary of Adani Enterprise Ltd, has conveyed that as coal supply other than the Harga Batubara Acuan (HBA) prices will be considered as violation of Indonesian Regulations resulting in suspension of license, suitable amendment in the price arrangement is required. In view of the promulgation of the Indonesian Regulations having an impact on the export price of coal from Indonesia, the petitioner has submitted that the cost of production of electricity from the Mundra Power Plant has increased tremendously which has rendered it commercially unviable to supply power to the respondents at the PPA price. Accordingly, the petitioner has approached the Commission for mitigating the hardship on account of the Indonesian Regulations.

Submissions of the Petitioner

11. The petitioner has submitted that the bid price of ₹2.35/kWh (comprising levelised energy charges and capacity charges of ₹1.35/kWh and ₹1.00 /kWh respectively) in its bid dated 4.1.2007 for supply to Gujarat from Phase III (Units 5 and 6) of the Mundra Power Project was based on use of domestic coal premised on GMDC commitment for allocating coal from Morga-II coal mine. According to the petitioner, since the increase in mining costs would have been minimal, and would have been offset by reduction in capacity charges over a period, the coal cost was predictable resulting in fixed tariff stream at the time of bid. Further, to ensure supply of fuel with optimum techno-commercial parameters, the petitioner also contemplated use of

imported coal for the limited purpose of blending. The petitioner has submitted that by way of a subsequent development, as directed by Appellate Tribunal for Electricity in its judgement dated 7.9.2011 in Appeal No.184/2010, the petitioner is now required to generate and supply power from Phase III of the Mundra Power Project to GUVNL based on FSA with AEL dated 24.3.2008 for supply of Indonesian coal. The petitioner has submitted that the quoted capacity charge assumed efficient procurement, operations and financing structure, leading to a lower capacity charge of ₹1.00/kWh in comparison to the CERC norms at the time of bid that resulted in ₹1.21/kWh on levelised basis.

12. The petitioner has submitted that the bid price of ₹2.94/kWh (comprising levelised energy charges and capacity charges of ₹1.963/kWh and ₹0.977/kWh respectively) for Haryana Utilities in the bid dated 24.11.2007 was premised on use of 70% indigenous coal and 30% imported coal. In the absence of a coal linkage or comfort letter (unlike the in-principle commitment given by GMDC by its consent dated 14.11.2006 for Gujarat bid), the petitioner took guidance from the Integrated Energy Policy of December 2005 for this assumption. The petitioner has submitted that the bid relied on regulated CIL prices for domestic and long-term price hedge for imported coal that was then available in Indonesian market. The petitioner has submitted that the levelised energy charges quoted was ₹1.963/kWh, and included transmission charges and losses of HVDC line of ₹0.48/kWh. The petitioner

has further submitted that similar to the Gujarat bid, the bid for capacity charge assumed efficient procurement, operations and financing structure, leading to a lower capacity charge of ₹0.977/kWh in comparison to the CERC norms at the time of bid that resulted in ₹1.19/kWh on levelised basis.

The petitioner has submitted that the fixed cost did not include the HVDC charges which were included in the energy charges based on the structures permitted in the bid documents. The petitioner has further submitted that based on the cost structure for fuel, HVDC line costs and the transmission losses, the bid offered was competitive, with an average CIF coal price of USD 36/MT. The petitioner has submitted that the quoted tariff was consistent with the terms and conditions of the FSAs and reflected prevailing market conditions for coal prices prior to Indonesian Regulations. The petitioner has reasoned that the international coal pricing scenario prevailing at the time of the bid permitted long-term contracts at a reasonable discount to the index values.

13. The petitioner has submitted that while submitting the bids to Haryana and Gujarat, the Petitioner had made express disclosure that imported coal would be required for optimum techno-commercial feasibility and to blend with indigenous coal. The petitioner had also annexed copies of the MoUs dated 9.9.2006 with Coal Orbis and dated 21.12.2006 with Kowa Company in support of its proposal to utilize imported coal to limited extent. The petitioner

has submitted that on account of cancellation of MoUs dated 9.9.2006 and 21.12.2006 and reneging of GMDC from its commitment to supply coal from the Morga-II coal block, the petitioner entered into two FSAs with AEL on 24.3.2008 and 15.4.2008 on the basis of AEL's mining licences in Indonesia through its subsidiary, PT Adani Global in order to proceed with the implementation of the project and the PPA. The petitioner has submitted that on the basis of these FSAs, financial closure of Phase III and Phase IV were completed on 27.3.2008 and 24.6.2009 respectively. The petitioner has further submitted that the arrangement with mining licensees in Indonesia through PT Adani Global could not meet the fuel needs of the Mundra Plant in view of inferior quality of the Bunyu coal which could at best be used to blend upto 10% to 15% of the coal requirement and also due to constraints in production from Bunyu mines to meet the entire requirement of the Mundra Plant. The petitioner has submitted that in order to mitigate the fuel supply and quality of fuel issues faced by APL and the Mundra Project, AEL on 14.12.2009, through its another wholly owned subsidiary, M/s. Adani Global PTE Ltd., Singapore ("Adani Global") entered into a long term contract with one of the leading suppliers of coal in Indonesia namely, M/s. PT Dua Samudera Perkasa at the same price range as was with the Adani group company. The petitioner has submitted that the said FSAs provided for supply of coal from Indonesia @ USD 36/MT CIF for coal of 5200 GCV and other conditions set out therein. The petitioner has submitted that the long term FSAs of Adani Global with PT Dua Samudera Perkasa has been directly impacted by the Indonesian

Regulations with effect from 24.9.2011. The petitioner has also submitted that on the domestic coal supply front, the fuel security faced further challenges as CIL stopped entering into coal supply agreements from March 2009 till June 2012. Pursuant to the issue of LoA dated 25.6.2009 by Coal India Limited, the FSA was signed with Mahanadi Coalfields Ltd, a subsidiary of CIL, on 9.6.2012. The petitioner has alleged that the terms of the FSA dated 9.6.2012 are most unfavourable, apart from being contrary to the New Coal Distribution Policy (hereafter 'NCDP') in force since 18.10.2007 under which coal linkage was to be allocated for the power projects to meet full requirement. The following provisions of the FSA dated 9.6.2012 have been termed by the petitioner as unfavourable:

(a) Under the FSA, the 'take or pay' commitment has been pegged at 80% of Annual Contracted Quantity corresponding to 85% PLF, which cannot meet the entire requirement of coal for supply of power committed in the PPAs which will cause shortfall in meeting the obligation of power supply.

(b) The FSA does not ensure supply of 80% of Annual Contracted Quantity through domestic coal and CIL can meet its obligation by importing coal in case of shortage of domestic coal, at the cost to be borne by the petitioner.

(c) No penalty is payable by CIL during initial contract period of three years for its failure to supply the committed quantity of coal and thereafter the meager penalty of 0.01% is imposable.

14. According to the petitioner, due to the subsequent unforeseen and unprecedented events on account of Indonesian Regulations and limited domestic coal linkage, it has become commercially impracticable for the petitioner to supply power at the bid out tariff as the fundamental premise on which the bid was made stands completely wiped out/altered. The petitioner has submitted that between the bid date and filing of the petition, the cumulative escalation of energy charges using the bid evaluation escalation rate works out to 20% as against the actual increase of 153% as per the present escalation rate. The petitioner has submitted that such an unforeseeable and unprecedented increase in coal prices could not have been foreseen by any bidder and is not a normal risk by any stretch of imagination. The petitioner has submitted that due to non-availability of domestic coal and increase in prices of Indonesian coal, the petitioner was procuring coal from Indonesia @ USD 92/MT which is currently @ USD 72/MT as compared to USD 36/MT before the notification of the Indonesian Regulations. Consequently, the petitioner is stated to have incurred a loss of approximately ₹790 crores for supply of power to GUVNL and ₹580 crores for supply of power to Haryana Utilities per annum.

15. The petitioner has submitted that even today Indonesia remains the most competitively priced source of coal for India. However, due to Indonesian

Regulations coming into force, the Petitioner will not be able to procure coal at the contracted price but instead will have to procure coal at the currently prevailing market price, which is significantly higher than the contracted price. The petitioner has submitted that the additional cost only on account of additional usage of imported coal and "change in law" in Indonesia for Haryana Bid is about 64 paisa per unit in the year 2012-13 and for Gujarat Bid is about ₹1.11 per unit in First Year based on exchange rate and coal price as in August, 2012. The petitioner has submitted that if it continues to use imported coal purchase at price prevailing in the spot market in Indonesia, its net worth will be eroded in around 2 years and the Mundra Project is at risk of lenders foreclosing and recalling the loan due to eroding creditworthiness. The petitioner has submitted that in such a situation, the petitioner will be left with no other option but to shut down the plant at the earliest, rather than bleed each day continuously. The petitioner has submitted that if the shutdown of Mundra Plant is to be prevented, the only solution is to adjust or revise the tariff.

16. The petitioner has submitted that between 23.9.2010 and 23.9.2011, there were bilateral Government to Government talks regarding whether the above Regulations should impact existing contracts. The petitioner has submitted that Adani Enterprises Ltd also discussed the issue with its lawyers in Indonesia and was advised that there was little chance of success and the judicial process could take a long time. Though the Coal Supply Agreements

provide for arbitration, the issue could not be referred to arbitration since promulgation of a law by Indonesian Government was not a commercial dispute under the fuel supply agreement and the arbitral court cannot overrule Indonesian law and cannot award damages since the seller is acting in accordance with Indonesian law. The petitioner as a member of the Association of Power Producers sought clarity through the Association on the applicability and the nature of the Indonesian Regulations, and the impact of the same on the coal exports from Indonesia to India under long term contracts. In response, the Indian Embassy at Jakarta by its letter dated 22.7.2011 conveyed the clarifications received from the Director General of Coal, Ministry of Energy and Mineral resources of the Government of Indonesia, inter alia, stating that coal sales in Indonesia is now regulated by Ministry of Energy and Mineral Resources Regulation of September 2010 and the contracts negotiated earlier prior to the enactment are required to be adjusted within 12 months. The petitioner has further submitted that the procurers were kept informed of the situation and were notified about the unprecedented and unforeseen fuel costs escalation and the need to arrive at viable solution including granting fuel cost escalation adjustment. It has been submitted that in spite of due notice of the issues, the procurers and the petitioner could not find any viable solution to the issues relating to fuel cost escalation.

17. The petitioner has submitted that it informed GUVNL vide its letter dated

25.7.2011 about the existence of "force majeure" events and sought urgent adjustment of tariff to get supply under the PPA dated 2.2.2007. On arrival of the SCOD of the generating stations on 2.2.2012, the petitioner is stated to have informed GUVNL vide its letter dated 6.2.2012 that it was in the process of approaching the appropriate authority for seeking relief for force majeure and supply of power from the project subject to the decision of the appropriate authority in which GUVNL in its letter dated 13.2.2012 has replied that GUVNL would take suitable view upon final decision of the appropriate authority or Court. The petitioner has further submitted that after promulgation of Indonesian Regulation it took up the matter with Haryana Power Purchase Centre by its letter dated 25.5.2012, notifying the occurrence of “change in law” and *'force majeure'* and seeking relief under Article 12.7(b) of the PPA for mitigation of the effect of force majeure, resulting in change of generation cost by adjusting the tariff to cover the revised coal prices. The Haryana Utilities are stated to have not responded to the request of the petitioner.

18. The petitioner has submitted that the Commission has the power under section 79 of the Act read with the National Electricity Policy and Tariff Policy to provide relief to the petitioner. Moreover, the PPA provides for “change in law” and *‘‘force majeure”* events to address the unprecedented and unforeseen impact of the Indonesian Regulations on the imported coal price and the Commission may consider to grant relief to the petitioner by suitable modification/revision in tariff.

Jurisdiction of the Commission

19. The petition was initially listed on the issue of maintainability. The respondents had seriously contested the jurisdiction of this Commission to entertain the petition, particularly on the ground that there was no composite scheme in case of Mundra Project so as to fall under section 79(1)(b) of the Act. The Commission after hearing the parties by order dated 16.10.2012 upheld its jurisdiction to adjudicate the dispute since the petitioner had entered into a composite scheme for generation and sale of electricity in more than one State and admitted the petition for hearing on merits. Haryana utilities sought review of the said order dated 16.10.2012 in Review Petition No. 26/2012. After carefully considering the issues raised and after hearing the parties, this Commission vide order dated 16.1.2013 dismissed the Review Petition. Thereafter the petition was taken up for hearing on merits.

Reply of GUVNL

20. GUVNL in its reply dated 27.12.2012 has submitted that the bid was submitted by Adani Enterprises Limited (AEL), the holding company of Adani Power Limited (APL), in respect of PPA dated 2.2.2007 on 4.1.2007. In the bid submitted, AEL did not opt for any escalation on the tariff of 25 years period either in the capacity charges or in the variable/energy charges though the bid terms issued provided the option to bidders for quoting escalable components

of capacity charge and variable/energy charges. Adani Enterprises quoted non-escalable levelized/uniform capacity charges of ₹1.00 per kWh and quoted non-escalable levelized/uniform energy charges of ₹1.3495 per kWh. GUVNL has submitted that as per the Indonesian Regulations, the coal mining and exporting companies in Indonesia are required to sell the coal not below the Benchmark prices. The excess revenue that accrue from following the Indonesian Regulations is retained by the coal exporting company in Indonesia and such revenue is not appropriated by the Indonesian Government either as royalty or taxes or cess or other levies, except to the extent of the rate of such taxes etc. which were there before on the increased sale price. GUVNL has submitted that Adani Power has admitted during the hearing that it was holding 74% equity share in an Indonesian coal company and therefore the petitioner is not adversely affected on account of Indonesian Regulations. It has been submitted that there is otherwise no prevention or prohibition or delay caused in the export of coal from Indonesia, by reason of the Indonesian Regulations. GUVNL has also submitted that the provisions of *''force majeure''* in the PPA cannot be invoked in the present case as there is no prohibition of any nature either wholly or partly on the export of coal from Indonesia or otherwise on the implementation of the fuel supply agreement between Adani Enterprises and Indonesian Supplier of coal. It has been further submitted that increase in price or the terms and conditions of an agreement making performance onerous or difficult cannot be said to be an event making the performance under *''force majeure''* within the meaning of

Article 12.3 of the PPA or otherwise the agreement to be considered as frustrated under Section 56 of the Indian Contract Act, 1872. GUVNL has further submitted that the Indonesian Regulations does not amount to “change in law” within the meaning of Article 13 of the PPA as the term 'law' defined in the PPA has to be construed as law in force in India and not that of laws of any country but including electricity laws in force in India. It has been submitted that the interpretation sought to be urged by the petitioner is wholly misconceived as the scope of the term law is nothing but Indian Law and the scheme of the definition of the PPA read together clearly established that the intention of parties was to apply only the Indian Law. GUVNL has submitted that the provisions of Article 12 of the PPA dealing with *‘‘force majeure”* and Article 13 dealing with “change in law” have no application to the present case. As regards the interpretation of Section 61, 62, 63, 64 and 79 of the Act by the petitioner to confer jurisdiction on the Commission to regulate the tariff determined through competitive bidding, GUVNL has submitted that the contention of the petitioner is complete mis-interpretation of the scheme of the Act and the objective and purpose sought to be achieved. It has been further submitted that any interpretation suggesting that the Commission can re-open the tariff determined through a competitive bidding process under Section 79 (1)(b) would be to convert a tariff based competitive bidding to a determination of tariff under Section 62 which would be a mockery of the competitive bidding process. GUVNL has submitted that there is no merit in the petition.

Reply of Haryana Utilities

21. Haryana Utilities in their reply dated 31.12.2012 have submitted that neither the *"force majeure"* clause nor the "change in law" provision contained in the PPA has any application to the present case and accordingly, no relief based thereon can be granted to the Petitioner. It has been further submitted that the Commission cannot in exercise of the Regulatory Power under Section 79 of the Act revise the tariff adopted under Section 63 of the Act and more particularly the tariff adopted by the State Commission of Haryana vide order dated 31.7.2008.

22. Haryana Utilities have submitted that in the bid submitted on 24.11.2007, Adani Enterprises did not opt for any escalation on the tariff of 25 years period either in the capacity charge or in the variable/ energy charges though the bid terms provided for option to the bidders for quoting escalable component of capacity charge and variable/ energy charge. However, the petitioner quoted non-escalable levelized capacity charge of ₹0.997/kWh and non-escalable levelized energy charges of ₹1.963 kWh. The assumptions/or predictions which the petitioner had made in deciding to quote the tariff with non-escalable fuel energy charges at the time of the bidding are not relevant. The decision to go on the basis of non-escalable energy charges was made by the petitioner while participating in the tariff based competitive bidding process in order to be commercially competitive and for being selected on the

face of other bidders. Haryana Utilities have submitted that it is not open to the petitioner to plead various developments in Indonesia or otherwise resulting in the change in the cost of procurement of coal.

23. Haryana Utilities have further submitted that the petitioner had not submitted the bid based on any coal linkage from Coal India or its subsidiary or otherwise supply of coal under any administrative price mechanism. The coal linkage was obtained by the petitioner subsequent to the bid. It has been further submitted that the changes in the coal linkage given restricting the quantum of supply under the Letter of Assurance and the terms and conditions proposed for signing of the Fuel Supply Agreement including the condition of supply of part of the coal from imported source are all bilateral issues between the petitioner and coal supplier and the same cannot have any implication to the contract between the petitioner and the Haryana Utilities for generation and supply of the contracted capacity of 1424 MW at the quoted tariff of ₹2.94 per unit.

24. Haryana Utilities have submitted that in terms of Article 12 of the PPA, the petitioner can claim *''force majeure''* only if there is an event or circumstance or combination of events or circumstances that wholly or partly prevents or unavoidable delays the performance of the petitioner's obligation under the PPAs, as provided in Article 12.3. The Indonesian Regulations does not in any manner wholly or partly prevent or unavoidably delay the

petitioner in the performance of the obligation under the PPA as provided in Article 12 of the PPA. The Indonesian Regulations does not prohibit wholly or partly the export of coal from Indonesia or other places on the implementation of Fuel Supply Agreement between Adani Enterprises Ltd. and Indonesian supplier of coal. As regards the “change in law”, the Haryana Utilities have submitted that 'law' as defined in the PPA is to be construed as laws in force in India and not that of laws of any country but including Electricity Laws in force in India. The term 'Electricity Laws' has been defined in the PPA with an enlarged scope and therefore has been specifically included in the definition of the term Law. Further, in terms of Article 13.1.1, the “change in law” provided for in sub clauses (i) to (iv) are all related to Indian Laws and not to the laws of Indonesia or any other country. Haryana Utilities have submitted that the petition is totally mis-conceived and liable to be dismissed.

Submissions during the hearing

25. We heard learned counsels for the parties on 17.1.2013, 6.2.2013, 7.2.2013 and 12.2.2013.

26. Learned Senior Counsel for the petitioner submitted that the petitioner and the respondents have entered into a contract and the underlying assumption in every contract is that it should be commercially viable and workable. Learned Senior Counsel submitted that in this case there is a contractual accident since a contingency has arisen which neither

party envisaged and which increased the cost of the project and made it commercially unviable. Learned Senior Counsel further submitted that the object of creating an independent regulator is to take into account the interest of all stakeholders including the generators and the procurers/consumers and therefore the regulator should evolve some mechanism to ensure that the generator is not rendered sick. Relying on paras 2, 4, 5.5.1, 5.8.2 and 5.8.4 of the National Electricity Policy and pars 4 (b) and 5.3 (a) of the tariff policy, Learned Senior Counsel submitted that infrastructure sector needs huge investments and private investments will not be attracted if a situation is created where the private sector with substantial investments is rendered completely sterile and is not able to recover whatever has been invested or is made to suffer losses. Citing paragraphs 4.11 and 5.7 of the Competitive Bidding guidelines, Learned Senior Counsel brought to the notice of the Commission that any dispute relating to tariff or tariff related matters are to be adjudicated by the Appropriate Commission without any restriction as to whether it is a firm price bid or otherwise. He further submitted that the adjudicatory powers are broad and wide enough to cover all situations. Learned Senior Counsel further submitted that the increase in price of Indonesian coal is a *"force majeure"* event and the performance of obligation under PPAs is excused on occurrence of any *"force majeure"* event in accordance with Article 12.3 of the PPAs. Learned Senior Counsel submitted that in view of Sections 32 and 56 of the Indian Contract Act, 1872, the PPAs are not enforceable and have become void as it has become impossible for the petitioner to supply power to the respondents at the agreed rates on account of increase in price of Indonesian Coal. Learned Senior Counsel clarified that the Hon'ble Supreme Court has construed "impossibility" as including the physical impossibility as well as the commercial impossibility. The underlying assumption is that the generator will make profit to ensure timely payment of loans and if the generator makes losses, it becomes commercially impracticable to discharge the obligations under the PPAs. Learned Senior Counsel stated that PPAs have to be interpreted on the basis of commercial practicability and this Commission may consider to declare the PPAs as void or allow escalation in tariff.

27. Continuing the argument, learned counsel for the petitioner argued that in exercise of its power under Section 61 of the Act read with regulatory power under clause (b) of sub-section (1) of Section 79, this Commission is competent to grant the relief claimed so as to mitigate the adverse impact on the petitioner, of increase in prices of coal imported from Indonesia consequent to promulgation of the Indonesian Regulation. Learned counsel urged that Section 63 of the Act which empowers the Appropriate Commission to adopt tariff determined through competitive bidding process does not override Sections 61 and 79 but prevails over Section 62 only. Relying on the judgments of the Hon'ble Supreme Court in PTC India Ltd vs CERC {(2010) 4 SCC 603}, UP Power Corporation Ltd Vs NTPC Ltd. & Others {(2009) 6 SCC 235} and State of UP Vs Hindustan Aluminium Corporation {(1979) 3 SCC

229}, learned counsel argued that by virtue of power to 'regulate' the tariff, the Commission has the power to determine, adjust tariffs as the 'power to regulate' includes power to adjust, order or govern by rule, method, or established mode; to adjust or control by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule, to control, govern, or direct by rules or regulations and that power to regulate includes within itself the power to regulate either by increasing the rate or decreasing the rate, the test being that it is necessary or expedient to be done to maintain, increase or secure supply of essential articles at fair prices. Learned counsel argued that If Section 63 is given overriding effect *qua* Sections 61 and 79, this would result in Section 63 denuding the Commission of its power under Section 79 and render Section 61 otiose, without any express statutory provision to that effect. It was submitted by learned counsel that both Section 62 and Section 63 provide for determination of tariff by following two different routes and thus are intended to serve the same purpose and are subject to same conditions. Learned counsel submitted that the policy and objective of the Act is to encourage private sector participation in generation, transmission and distribution of electricity and to entrust the regulatory responsibility earlier vested in the Government to the Regulatory Commissions. Learned counsel submitted that by virtue of Section 61 of the Act, the factors to be considered by this Commission on the tariff related matters include encouraging competition, efficiency, economical use of the resources, good performance and optimum investments; safeguarding of consumers' interest and at the same time, ensuring recovery of the cost of electricity in a reasonable manner and the principles rewarding efficiency in performance and this Commission is obligated to act in accordance with these principles irrespective of whether the tariff is determined under Section 62 or Section 63. Learned counsel submitted that the competitive bidding guidelines notified by the Central Government pursuant to power under Section 63 also contemplate that this Commission shall continue to exercise regulatory oversight even after culmination of the bidding process. Learned counsel emphasized that by virtue of sub-section (4) of Section 79, this Commission is guided by the National Electricity Policy and the Tariff Policy notified by the Central Government under Section 3 of the Act. He relied upon the different provisions of these policies to draw support for his argument that this Commission should ensure recovery of cost of generation by the petitioner.

28. Learned counsel for the petitioner next argued that promulgation of the Indonesian Regulation falls within the purview of “change in law” provision under Article 13 of the PPAs as the expression ‘all laws’ used in the definition of ‘Law’ includes the enactment of Indonesian Regulation. Learned counsel argued that the term ‘Law’ defined under the PPAs is required to be interpreted on contextual basis so as to give business efficacy to the PPAs and in that view of the matter, ‘law’ cannot be interpreted to exclude Indonesian law and limit to Indian law when the entire project or the bid is predicated on imported coal. Learned counsel argued that where it was

intended to restrict the operation of law to Indian Law, it so specifically provided in the PPAs. It was urged that since the Indonesian Regulation was affecting discharge of the petitioner's obligations, the petitioner is entitled to claim relief on that account and seek offsetting the effect of increase in prices of imported coal. It was argued that Article 13.2 clearly envisages that the affected party is entitled to be restored to the same economic position as obtaining prior to promulgation of the Indonesian Regulation.

29. Learned counsel for the petitioner further submitted that the steep increase in price of Indonesian coal consequent to enactment of Indonesian Regulation has made the performance of the PPAs commercially impossible and falls within the scope of the *''force majeure''* provisions of Article 12 thereof. It was contended that enactment of Indonesian Regulation was never foreseen as the export of coal based on bilateral contracts was permitted since 1967. Learned counsel submitted that manifold increase in generation cost as a consequence of enactment of Indonesian Regulation has made it commercially impossible for the petitioner to discharge its obligations under the PPAs for supply of electricity at the agreed tariff. Consequently, according to learned counsel, this is a fit case where this Commission should interfere by invoking Article 12 of the PPA. Learned counsel argued that the definition of *''force majeure''* under Article 12.3 of the PPA is not exhaustive and any event which wholly or partly prevents an affected party in the performance of its contractual obligations is covered within the scope of *''force majeure''.* It was

vociferously argued that the Indonesian Regulation had in essence prevented the petitioner from supplying power under the PPAs on the ground of commercial expediency.

30. To supplement the submissions made with reference to Article 12 of the PPAs, learned counsel for the petitioner argued that in view of the supervening circumstances, the performance of the obligations under the PPAs has become impossible and the petitioner is excused from performance of its obligations by virtue of Sections 32 and 56 of the Contract Act, 1872. Learned counsel argued that the term ‘impossible’ used in Section 56 of the Contract Act is not restricted to physical impossibility but also extends to commercial impossibility as held by the Hon’ble Supreme Court in a number of cases. Learned counsel submitted that the petitioner had notified GUVNL vide letter dated 25.7.2011 and the Harayana Utilities vide letter dated 25.5.2012 about the existence of the circumstances leading to frustration of the PPAs and sought adjustment of tariff to get the power supply. However, learned counsel submitted that the respondents are not forthcoming to find a solution to the problem in terms of the provisions of the PPAs.

31. Learned counsel for the petitioner lastly argued that renegotiation of long term contracts is the worldwide accepted principle where external uncontrollable factors have impacted the viability of a project. It was urged by learned counsel that the principles of interpretation of contracts are that the

contracts are to be interpreted in a manner that it gives them business efficacy.

32. Learned counsel for the petitioner argued that India had acceded to the statute of International Institute for the Unification of Private Law ("**UNIDROIT**") which has developed a general set of rules on commercial contracting known as the UNIDROIT Principles of International Commercial Contracts. According to learned counsel, UNIDROIT principles recognize that hardship caused to a party to the contract is normally of relevance to renegotiation of long-term contracts. He further relied upon a study by J. Luis Guasch, published by World Bank Institute of Development Studies (2004) which also points out that renegotiation of a contract is considered relevant if a concession contract has undergone a significant change or amendment not envisioned or driven by stated contingencies. It was pointed out in the study that renegotiation was a positive instrument to address the inherently incomplete nature of concession contracts as mechanism can enhance welfare if used properly. The study also shows that more than 46% of the contracts entered through competitive bidding have been renegotiated. Learned counsel also relied upon the Report of Jon Stern, Centre for Competition and Regulatory Policy, Department of Economics, City University London, London UK titled "The Relationship between Regulation and Contracts in Infrastructure Industries: Regulation as ordered renegotiation" published by Centre for Competition and Regulatory Policy, Department of

Economics, City University London, London (2012). According to this report, all long term contracts are incomplete as it is not possible to imagine all possible contingencies arising during their currency. The report points out that the longer the duration, more flexible are the contracts on the issue of price renegotiations. By placing reliance on 'Interpretation of Contracts' by Sir Kim Lewison (2007), learned counsel argued that while interpreting the contract, the law generally favours a commercially sensible construction since a commercial construction is more likely to give effect to the intention of the parties. Further, by invoking the principle of *contra proferentem* in the context of interpretation of contracts, learned counsel argued that an ambiguous term would be construed against the party that imposed its inclusion in the contract and therefore would favour the party that did not insist on its inclusion. Based on this proposition, learned counsel argued that the PPAs were drafted by the respondents as the procurers of power and were to be interpreted against them in case the principle of commercial viability could not be applied in the present case. In this connection, learned counsel relied upon the judgements in (i) Bank of India and Anr Vs. K. Mohandas & Others {(2009) 5 SCC 313}, (ii) Sahebzada Mohd. Kamgarh Shah Vs. Jagdish Chandra Deb Dhabal Deb {(1960) 3 SCR 60}.

33. Learned counsel for the respondents submitted that under clause (b) of sub-section (1) of Section 79 of the Act, this Commission has only the power of regulation of tariff and the adjudicatory power is conferred under

clause (f) thereof. He argued that since the petitioner has sought adjudication of its claims on the basis of *'force majeure"* and "change in law" provisions under the PPAs, it does not involve exercise of regulatory jurisdiction but involves exercise of adjudicatory jurisdiction. Learned counsel argued that any dispute between the parties involving the questions of interpretation, application and implementation of the PPAs would come to the Commission for adjudication only in terms of the PPAs and not otherwise. He submitted that the tariff adopted under Section 63 of the Act pursuant to the competitive bidding process cannot be revised or modified because there is no provision for revision or modification of competitively bid tariff after its adoption by the Appropriate Commission, the respective State Commissions in the present case. According to learned counsel, the petitioner's effort to seek revision of tariff in exercise of regulatory power of this Commission under clause (b) of sub-section (1) of Section 79 of the Act is misplaced. He further argued that Section 61 of the Act too does not apply in case of the competitively bid tariff since the factors mentioned therein are to be considered by the Appropriate Commission while formulating the terms and conditions for determination of tariff and the case on hand does not involve determination of tariff based the terms and conditions specified under Section 61 of the Act. Refuting the petitioner's arguments based on National Electricity Policy and the Tariff Policy, learned counsel argued that the policies only provide that all factors should be taken into account for enabling investment in the generation sector, but these factors are to be taken into consideration by the bidders at the stage of the bidding, and not after culmination of the bidding process and execution of the PPAs. Learned counsel placed on record a copy of the order dated 7.1.2013 of GERC in Petition No. 1210/2012 wherein the petitioner took parallel proceeding for giving effect to the changes in law on account of levy of additional duties/taxes and wherein GERC upheld its jurisdiction in the matter.

34. On the petitioner's plea for invoking "change in law" provision given under Article 13 of the PPAs, learned counsel for the respondents submitted that the definition of 'Law' in the PPAs does not include the laws of a foreign country. According to learned counsel, reading of the foreign laws into the definition will lead to absurd results. Therefore, according to learned counsel, under Article 13 "change in law" benefit is available for change of Indian law and that the petitioner cannot seek adjustment or upward revision of tariff consequent to promulgation of the Indonesian Regulation by resorting to Article 13 of the PPAs.

35. As regards the petitioner's plea based on the ''*force majeure*'' clause under Article 12 of the PPAs, learned counsel for the respondents submitted that the ''*force majeure*'' condition under the PPAs is not attracted since increase in price does not impact the performance of the contract. He submitted that the price increase by virtue of Indonesian Regulation does not prevent the petitioner from generation of electricity and meet its obligation of

supply of electricity but only makes performance of the obligation more onerous. It was submitted that the risk and responsibility for arranging fuel are that of the petitioner as the project developer and the petitioner was obliged to supply power to the respondents at the agreed tariffs. Learned counsel strenuously argued that Adani Enterprises Ltd in the FSA dated 8.12.2006 had represented to the petitioner that the former had entered into arrangements for supply of coal from mines in the countries like Indonesia, South Africa etc. and was in a position to meet the petitioner's requirement for a period of 15 years. Thus, according to the learned counsel, the Adani Enterprises Ltd has made arrangement for supply of coal through more than one contract and not through one contract for import of coal from Indonesia. Learned counsel further pointed out that under the PPAs, change in price is a specific exclusion from the *''force majeure''* condition. Learned counsel relied on judgment of Hon'ble Delhi High Court dated 2.7.2012 in ***Coastal Andhra Power Limited v Andhra Pradesh Central Power Distribution Company Ltd***, (*OMP No. 267/ 2012)* wherein while interpreting a provision exactly similar to Article 12 under similar circumstances as applicable to the present case, the Hon'ble High Court rejected the plea of applicability of *''force majeure''* clause. Learned counsel in particular relied upon the following observations of the Hon'ble High Court:

> *"………….it is not possible to agree with the submissions made on behalf of CAPL that the increase in fuel costs would, notwithstanding the exception carved out in Clause (a) of Article 12.4, constitute ''force majeure''. There is no doubt about there being a double negative on a collective reading of the above clauses. Still, it does appear prima facie*

that the parties intended that rise in fuel costs would not be treated as a ''force majeure" event. In a supply contract, particularly where the commodity in question is being imported, parties generally factor in the possibility of sudden fluctuations in international prices. Supply contracts therefore provide for risk purchase and such like clauses. Article 13.2 permits CAPL to seek compensation for any loss it might suffer on account of change in the law. Therefore, that very event, viz., change in the law, could not also have been intended to constitute a ''force majeure" event leading to increase in fuel costs. "Change in Law" and the consequences thereof are treated separately under the PPA……."

36. Learned counsel for the respondents pointed out that it was mentioned in GUVNL bid that the indigenous coal requirement was tied up with GMDC from Morga II coal block. As an alternative, it was stated in the bid of the Consortium that Mundra Power Project site was being evaluated for operation with blended/imported/washed coal and that Adani Enterprises had an arrangement with Coal Orbis Trading GMBH and Kowa Company Ltd under separate MoUs for import of coal. So far as Haryana bid is concerned, learned counsel pointed out that the petitioner had not indicated that any FSA was already in place for supply of fuel. On the contrary, against the relevant columns in the bid documents regarding arrangement for coal supply with CIL or whether coal supply was covered under Administered Price Mechanism (APM), it was stated 'not applicable'. Therefore, according to learned counsel, it cannot be argued that the bid was premised on the basis of 70% coal supply from India or domestic coal and 30% on the basis of imported coal. In terms of the bid made by the petitioner, indigenous coal was to be used without connecting to the supply through allocation of coal linkage by CIL.

37. Learned counsel for the respondent further argued that Adani Enterprises Ltd had contributed to 74% of the shareholding in the Indonesian coal company, and would have drawn benefits for the equity investment consequent to increase in prices of coal exported from Indonesia.

38. Learned counsel argued that on the basis of backward calculation of energy charge it can be established that the difference between the quoted tariff calculated based on the coal price prevailing at the time of submission of bids and the tariff computed on current coal prices is very less and thus disputed the correctness of the petitioner' claim of loss of nearly ₹1/kWh on account of promulgation of Indonesian Regulation. According to learned counsel, based on the formula given in this Commission's tariff regulations applicable for the tariff period 2009-14 for working out energy charge and considering the parameters for gross station heat rate, auxiliary energy consumption, gross calorific value of fuel as per the GERC's order dated 7.1.2013 in Petition No 1210/2012, the landed price of primary fuel (coal) by back calculations works out to ₹3.041/Kg. On conversion of landed price of coal of ₹3.041/Kg into cost into USD/MT at the exchange rate of ₹45/USD applicable at the time of bidding and based on energy charge of ₹1.3495/kWh considered by the petitioner for the bid dated 4.1.2007 submitted to GUVNL, the landed coal price works out to USD 67.6/MT with coal of GCV of 5200 kcal/kg. After adjusting the freight and other incidental charges at the rate of USD12/MT, the rate is equivalent to the rate of USD 56/MT (FOB). In case of

Haryana bid dated 24.11.2007, the energy charge was ₹1.900/kWh, and accordingly landed cost of coal works out to USD 95.5/MT and after adjusting freight and other incidental charges of USD 12/MT, the price of coal comes to about USD 83/MT (FOB) for coal with GCV of 5200 kcal/kg. Learned counsel pointed out that for coal of GCV less than 5200 kcal/kg, the landed cost steadily reduces and for coal with GCV of 4300 kcal/kg, the landed price works out to USD 55.9/MT and USD 78.9/MT for the energy charge of ₹1.3495/kWh and ₹1.900/kWh respectively bid by the petitioner for GUVNL and the Haryana Utilities. Learned counsel pointed out that the petitioner can use coal of lower GCV instead of coal with GCV of 5200 kcal/kg and thereby reduce the energy charge. Based on the computations, learned counsel argued that for almost all grades of coal, the current prices come to the same level as in Jan 2010 after indexation with reference to coal prices/price indices published by Indonesian Government up to January 2013. Learned counsel pointed out that the exchange rate of ₹55/USD considered in the petition for adjustment of tariff has nothing to do with promulgation of Indonesian Regulation as FERV risk is of the petitioner who must have factored it in the bids made.

39. Learned counsel pointed out that the petitioner quoted the levelised energy charge of ₹1.3495/kWh for GUVNL bid for entire 25 years though the bid document gave an opportunity to quote energy charge on escalable and non-escalable basis and provide for formula for escalation for aligning the

energy charge to market forces. He submitted that other bidders such as CGPL, Reliance Power, etc quoted escalable energy charge. Learned counsel alleged that the petitioner quoted energy charge on non-escalable basis to edge out the other bidders.

40. It was further argued by learned counsel for the respondents that J Louis Guasch in his study referred to only future contracts/concessions and that this study does not provide any guidance for its application to the contracts already executed. According to the learned counsel, the facility of renegotiation cannot be used to correct the mistakes in the bidding committed by the petitioner while firming up its bids.

41. Learned counsel submitted that the petitioner quoted the tariff of ₹2.89/kWh for Bid No 1 against tariff of ₹2.3495/kWh for Bid No 2, and thus made a windfall gain in the first bid, though the source of supply of power in both the cases is the same, that is, Mundra Power Project. Learned counsel submitted that despite the huge differences, GUVNL was not seeking downward revision of tariff for Bid No 1.

42. In the context of the respondents' argument that the tariff quoted by the petitioner was non-escalable, Mercados, the petitioner's consultant clarified that the energy charge in case of Gujarat bid was quoted on non-escalable basis in view of back-to-back arrangements based on GMDC's in-principle commitment for supply of coal from Morga coal block, because of which lower

energy charges were quoted. Imported coal was factored as a potential fallback option to domestic shortfall after the techno-economic feasibility study. The factors that weighed with the petitioner for quoting non-escalable energy charge were explained by Mercados as under:

(i) Based on the Commission's fuel price escalation index published in October 2006, quoting non-escalable charges led to more competitive bid.

(ii) The Commission's reports indicated that discounts available under long-term contracts were better reflected as non-escalable component rather than escalable one.

(iii) Under the bid conditions, there was restriction to quote energy charge only on one type of fuel even if bid envisaged use of fuel from more than one source.

(iv) There was availability of back-up supply option from Indonesia at predicable price on long-term basis at the relevant times in the event of failure of domestic source of supply of fuel.

(v) The bidders prefer to go for non-escalable rates because apart from having advantages in bid computation it also reflects the control and hedging abilities.

43. The petitioner's consultant pointed out that the capacity charge considered by the petitioner in the bid made for supply of power to Gujarat was lower than that worked out based on prevalent norms of the Commission for cost-plus pricing, primarily because of favourable debt-equity structure considered by the petitioner. Mercados further clarified that tariff in case of supply of power to Haryana was on the higher side because transmission charges and transmission losses for conveyance of power from Gujarat to Haryana had to be factored.

44. While explaining the scope of judgment of the Hon'ble Delhi High Court in ***Coastal Andhra Power Ltd*** (supra) on which reliance was placed by learned counsel for the respondents, it has been explained by the learned counsel for the petitioner that the judgment itself indicates that the views expressed therein were tentative only and were not intended to influence any final view that might be taken in proceedings elsewhere. It was, therefore, urged that this Commission is competent to take a final view in the present matter on analysis of the applicable facts and circumstances.

Analysis and Decision

45. We have very carefully considered the rival submissions. The main issues that arise for our consideration is whether the promulgation and coming into effect of Indonesian Regulations and non-availability of domestic coal linkage have resulted in a situation where the project of the petitioner has

become commercially unviable, making it impossible for the petitioner to supply power to the respondents at the tariff agreed in the PPAs. If the answer to this question is in the positive, we have to consider whether the case of the petitioner falls under *"force majeure"* or "change in law" for the purpose of granting relief to the petitioner under the provisions of the PPA. Alternatively, whether the Commission has power under the Act and the National Electricity Policy and tariff policy to grant relief to the petitioner without revisiting the tariff agreed in the PPAs. We shall deal with the issues one by one.

Impact of Indonesian Regulations on tariff agreed in the PPAs

46. The petitioner has submitted that it is using imported coal for generation of power from Phase III of Mundra Power Project to Gujarat. In respect of Haryana Utilities, the petitioner is stated to depend on imported coal upto 58% of the requirement as the domestic coal linkage is available for 42 % only. The respondents have argued throughout that the petitioner was selected to supply power to GUVNL and Haryana Utilities, on the basis of Case 1 bidding, and therefore it is the sole responsibility of the seller to arrange for fuel and the petitioner having quoted non-escalable energy charges in both the cases is not entitled to any escalation in coal prices, leave aside the escalation in imported coal prices subsequent to the promulgation of Indonesian Regulations. It is evident from the record that at the time of submission of bids, the petitioner had disclosed that it would import coal to a limited extent from Indonesia for techno commercial purposes in respect of Gujarat bid and

would use indigenous/imported coal in respect of Haryana bid and had submitted its MoUs with Kowa and Coal Orbis Trading in support of its claim. For arrangement of domestic coal in respect of Gujarat bid, the petitioner had submitted the letter from GMDC committing to supply coal from the Morga II mines in Chhatisgarh and no proof was submitted with regard to arrangement of domestic coal for Haryana bid. Supply of coal from GMDC did not materialise and the MoUs with Kowa and Coal Orbis were terminated. The petitioner entered into a FSA dated 8.12.2006 with Adani Enterprises Limited for supply of imported coal as the latter had arrangement for procurement of coal from various countries like Indonesia, South Africa etc. Subsequently, the petitioner entered into FSA dated 24.3.2008 and another FSA dated 15.4.2008 with Adani Enterprises Limited for supply of coal from Indonesia to the Phase III and Phase IV of Mundra Power Project respectively. All the three FSAs have been merged in a Consolidated FSA dated 26.7.2010. After promulgation of the Indonesian Regulation, Adani Enterprises Ltd had been supplying coal by purchasing at the international benchmark prices to Phase III and Phase IV of the Mundra Power Project. Though there is no embargo on the petitioner to arrange domestic coal, the petitioner's dependence on the imported coal is stated to be on account of non-availability of domestic coal linkage and the inability of Coal India Limited to supply coal for full contracted capacity of the project under the existing coal linkage. Therefore, as the position stands today, the petitioner is depending on the imported coal to meet the full coal requirement of Phase III and more than 50% of coal requirement of Phase IV of Mundra Power Project.

47. Government of Indonesia promulgated Indonesian Regulations on 23.9.2010 and all Term Supply Contracts (Long Term Contracts) are to be adjusted to the regulations by 23.9.2011. As per the Indonesian Regulations, sale of coal from Indonesia shall conform to the benchmark price of coal on monthly basis based on a formula that refers to the average price index of coal in accordance with the market mechanism and/or in accordance with the prices generally accepted in the international market. Consequent to the operation of Indonesian Regulations, it is the contention of the petitioner that the landed price of coal has increased compared to the landed price of coal contemplated under the Consolidated Coal Supply Agreement dated 26.7.2010.

48. On account of the requirement to buy coal according to international benchmark price in place of the negotiated price agreed in the FSA, the petitioner has claimed relief in the petition in the context of tariff quoted in case of GUVNL on the following basis:

> *"24. This is evident from the fact that prior to September 2011, the Applicant procured imported Coal at base price of USD 36 per MT for Coal of 5200 kcal/kg. GCV with other standard specifications subject to price variation based on variation in standards/specifications. As such, the average procurement price from the time when the Applicant started using imported coal from March 2010, until September 2011, when the new Indonesian Regulation was effective was about USD 36 per MT. After September 2011, until the*

date of filing of the present petition, the Applicant has been procuring the Coal based on the indexed price fixed in accordance with the new Indonesian Regulation which has ranged from USD 91 to USD 102 per MT (CIF). There has, therefore, been multi fold increase in the price of Coal procured by the Applicant, which resulted in supplying power at ₹2.3495 per unit impossible and unviable.

IV. Sustainability of Operation under PPA

25. In view of the above substantial change in circumstances, there has, therefore been multifold increase in the price of Coal which will result in supplying power at a levelised tariff of ₹2.94 per unit which is impossible and unviable.

26. An illustrative per unit based energy cost calculation is given hereunder:

Particular	*Unit*	*After Enactment*
CIF Prices	*USD/MT*	*92*
Exchange Rate	*Rs/USD*	*55*
CIF Prices	*Rs/MT*	*5060*
Port Handling Charges	*Rs/MT*	*280*
Landed Cost of Coal (incl loss @0.5%)	*Rs/MT*	*5366.8*
Gross Calorific Value	*kcal/Kwh*	*5200*
Station Heat Rate	*kcal/Kwh*	*2350*
Aux consumption	*%*	*7.50%*
Specific Coal Consumption per unit sent out	*Kg/Kwh*	*0.4886*
Fuel cost Per Unit (at Delivery Point)	*Rs/Kwh*	*2.472*
Quoted Levelised Energy Charges	*Rs/Kwh*	*1.350*
Increase in fuel cost over quoted Levelised tariff	*Rs/Kwh*	*1.122*

Add to the fuel cost (energy charges), the Applicant also has capital cost (capacity charges) to be added for each year or at a levelised rate of ₹1.00 per unit.

The above illustration shows that the supply of Power under the aforesaid PPA at the quoted tariff per Unit has become impossible and/or commercially unviable since due to enactment of Indonesian Regulation, the fuel cost per unit has increased over ₹1.122 per unit of electricity generated depending on spot prices of coal in international market which keeps on fluctuating. Consequently, performance under the PPA with the Respondent has become commercially unviable for supply of power at a quoted tariff and the said PPA would stand frustrated on account of subsequent development, which have direct impact on the performance of the Applicant under the PPA, unless and until the Hon'ble Central Commission suitably adjust the tariff and / or directs Respondent to adjust the tariff to factor and /or account for the increase in the cost of fuel."

49. GUVNL in its written submission dated 19.2.2013 has submitted in response to the above claim of the petitioner as under:

"66. As per page-16 of the Write up Submitted on 12.02.2013 the maximum & minimum price of coal for 5400 K Cal & 5000 kcal/kg GCV coal at the station heat rate and other parameters as submitted by Adani Power before the Gujarat Electricity Regulatory commission works out as under:

			Melewan Coal	**Envirocoal**
kcal/Kg. (gar)			5400	5000
Max. price in USD per MT during the period Sept-2011 to Jan-2013			91.4	84.17
Min. price in USD per MT during the period Sept-2011 to Jan-2013			64.2	60.13
Average price in USD per MT during the period (Sept-2011 to Jan-2013)			**77.8**	**72.2**
On the basis of the above the comparative working at para-26 (page 50-51) of the petition filed by Adani Power in this Hon'ble Commission and the realistic working is as under on the above average price				

		As per APL	As per realistic working(*)	
Particular	**Unit**	**After Enactment**		
CIF Prices	USD/MT	92	77.8	72.2
Exchange Rate	₹/USD	55	45	45
CIF Prices	₹/MT	5060	3501.0	3246.8
Port Handling Charges	₹/MT	280	280	280
Landed Cost of coal (incl. loss @ 0.5%)	₹/MT	5366.8	3800.0	3544.5
Gross Calorific Value	kcal/Kg.	5200	5400	5000
Station Heat Rate	kcal/Kwh	2350	2150.27	2150.27
Aux. Consumption	%	7.50%	6.50%	6.50%
Specific Coal consumption per unit sent out	Kg./Kwh	0.4886	0.4259	0.4600
Fuel Cost per unit (at Delivery Point)	₹/Kwh	2.472	1.491	1.493
Quoted Levelised Energy Charges	₹/Kwh	1.350	1.350	1.350
Increase in fuel cost over quoted levelised tariff	₹/Kwh	**1.122**	**0.141**	**0.143**

(*) The working is based on following assumptions / facts:

1. The markers of GCV of 5400 and 5000 are considered since marker for 5200 GCV is not available under No. 1-8 types of coal.
2. The price of fuel is average of maximum & minimum price of imported coal during the period September-2011 to January-2013
3. The corresponding GCV of coal (i.e. 5400 and 5000) in respect of the assumed price is considered
4. The Station Heat Rate (2150.7) & Aux. Consumption (6.5%) is taken as approved by Hon'ble GERC in order dated 07-01-2013.
5. The Exchange rate is considered as ₹45 per USD at the time of bidding since APL had quoted non escalable variable charge only and accordingly FERV risk was on APL

50. The petitioner has submitted calculation in respect of the tariff of Haryana Utilities as under:

"34. An illustrative per unit based energy cost calculation is given hereunder:

Calculation of per unit fuel cost using Indonesian coal

Particular	Unit	After Enactment
CIF Prices	USD/ MT	92
Exchange Rate	₹/ USD	55
CIF Prices	₹/ MT	5060
Port Handling Charges	₹/ MT	280
Landed Cost of coal (incl. loss &0.5%)	₹ /MT	5366.8
Gross Calorific Value	kcal/Kwh	5200
Station Heat Rate	kcal/ Kwh	2350
Aux Consumption	%	7.50%
Specific Coal Consumption per unit sent out	Kg/ Kwh	0.4886
Fuel Cost per unit (at Generator Bus Bar)	₹/ kWh	2.472
Transmission Charges and Losses (Mundra- Mohindergarh)	₹/ kWh	0.49
Fuel Cost (per unit at Delivery Point)	₹/ kWh	2.96
Quoted Levelized Energy Charges	₹/ kWh	1.963
Increase in fuel cost over quoted levelized tariff	₹/ kWh	0.997

Add to the fuel cost (energy charges), the Applicant also has capital cost (capacity charges) to be added for each year or at a levelized rate of ₹0.977 per unit."

51. The Haryana Utilities in their written submission have contested the claim of the petitioner as under:-

"67. As per page-16 of the Write up Submitted on 12.02.2013 the maximum & minimum price of coal for 5400 K Cal & 5000 kcal/kg GCV coal at the station heat rate and other parameters as submitted by Adani Power before the Gujarat Electricity Regulatory commission in case of GUVNL in the absence of such details for Haryana, sale works out as under:

			Melewan Coal	Envirocoal
kcal/ kg. (gar)			5400	5000
Max. price in USD per MT during the period Sept-2011 to Jan- 2013			91.4	84.17
Min. Price in USD per MT during the period Sept-2011 to Jan-2013			64.2	60.13
Average price in USD per MT during the period (Sept-2011 to Jan-2013)			77.8	72.2
On the basis of the above the comparative working at para-26 (page 50-51) of the petition filed by Adani Power in this Hon'ble Commission and the realistic working is as under on the above average price				
		As per APL	**As per realistic working (*)**	
Particular	**Unit**	**After Enactment**		
CIF Prices	USD/MT	92	77.8	72.2
Exchange Rate	₹/ USD	55	45	45
CIF Prices	₹/ MT	5060	3501.0	3246.8
Port Handling Charges	₹/ MT	280	280	280
Landed Cost of Coal (incl. loss @ 0.5%)	₹/ MT	5366.8	3800.0	3544.5
Gross Calorific Value	kcal/ Kg.	5200	5400	5000
Station Heat Rate	kcal/ Kwh	2350	2150.27	2150.27
Aux. Consumption	%	7.50%	6.50%	6.50%
Specific Coal consumption per unit sent out	Kg./ Kwh	0.4886	0.4259	0.4600
Fuel Cost per unit (at Delivery Point)	₹/ Kwh	2.472	1.491	1.493
Quoted Levelised Energy Charges	₹/ Kwh	1.963	1.963	1.963
Increase in fuel cost over quoted levelised tariff	₹/ Kwh	0.504	--0.477	--0.475

(*) The working is based on following assumptions/ facts:

1. The markers of GCV of 5400 and 5000 are considered since marker for 5200 GCV is not available under No. 1-8 types of coal.
2. The price of fuel is average of maximum & minimum price of imported coal during the period September-2011 to January-2013.
3. The corresponding GCV of coal (i.e. 5400 and 5000) in respect of the assumed price is considered.
4. The Station Heat rate (2150.7) & Aux. Consumption (6.5%) is taken as approved by Hon'ble GERC in order dated 7.1.2013.
5. The Exchange Rate is considered as ₹45 per USD at the time of bidding since APL had quoted non escalable variable charges only and accordingly FERV risk was on APL.

GAR – Gross As Received

52. From the submission of the parties as noted above, it is apparent that in case of GUVNL there is impact of Indonesian Regulations on the fuel cost for generation of electricity. In case of Haryana, it appears that Haryana Utilities have not considered the transmission charges and losses of ₹0.48/kWh which is stated to have been factored by the petitioner in the energy charges. If the

same is taken into account, then there will be marginal increase in the fuel cost. Moreover, the assumptions based on which these figures have been arrived at need to be carefully considered. The Commission does not intend at this stage to go into the detailed calculations of energy charges as submitted by the parties since the purpose is to find out whether prima facie there is any merit in the claim of the petitioner for enhanced tariff on account of import of coal from Indonesia at benchmark international price. For this purpose, it will suffice if we compare the landed cost of coal as on the date of the bid as per the Consolidated FSA dated 26.7.2006 between the petitioner and Adani Enterprises Limited based on which coal is being supplied and the prevailing market price of coal since the promulgation of the Indonesian Regulation. For this purpose the following data available in the public domain (Source : http://www.djmbp.esdm.go.id) have been considered:

(USD/MT)

Month	HBA (USD ton) 6322 kcal/kg	Melawan Coal 5400 kcal/ kg (gar)	Envirocoal 5000 kcal/ kg (gar)
2013			
Mar 2013	90.09	70.42	65.63
Feb 2013	88.35	69.17	64.52
Jan 2013	87.55	68.60	64.02
Rata 2	88.66	69.40	64.72
2012			
Dec 2012	81.75	64.42	60.33
Nov 2012	81.44	64.20	60.13
Oct 2012	86.04	67.51	63.05
Sep 2012	86.21	67.63	63.16
Aug 2012	84.65	66.51	62.17
July 2012	87.56	68.60	64.02
June 2012	96.65	75.14	69.80
May 2012	102.12	79.08	73.28
Apr 2012	105.61	81.59	75.50
Mar 2012	112.87	86.81	80.12
Feb 2012	111.58	85.89	79.30
Jan 2012	109.29	84.24	77.84
Rata 2	95.48	74.30	69.06

2011			
Dec 2011	112.67	86.67	79.99
Nov 2011	116.65	89.53	82.53
Oct 2011	119.24	91.40	84.17
Sep 2011	116.26	89.25	82.28
Aug 2011	117.21	89.94	82.88
July 2011	118.24	90.68	83.54
June 2011	119.03	91.25	84.04
May 2011	117.61	90.22	83.14
Apr 2011	122.02	93.40	85.94
Mar 2011	122.43	92.29	84.12
Feb 2011	127.05	95.62	87.06
Jan 2011	112.40	85.08	77.74
Rata 2	118.40	90.93	83.61
2010			
Dec 2010	103.41	78.61	72.02
Nov 2010	95.51	72.92	67.00
Oct 2010	92.68	70.89	65.20
Sep 2010	90.05	68.99	63.53
Aug 2010	94.86	72.46	66.59
July 2010	96.65	73.74	67.72
June 2010	97.22	74.16	68.09
May 2010	92.07	70.45	64.81
Apr 2010	86.58	66.50	61.32
Mar 2010	86.64	66.54	61.36
Feb 2010	87.81	67.44	62.15
Jan 2010	77.39	59.88	55.47
Rata 2	91.74	70.21	64.60

HBA: Harga Batubara Acuan (Official benchmark price of Indonesia)

53. It is to be noted that coal was sold at the spot price of around USD 45/MT in the year 2007 in the Indonesian Market as submitted by the petitioner. No indexing of coal price was available in Indonesia at that point of time. In the absence of indexed coal price, it can be assumed that the then prevailing market price in Indonesian market in 2007 was USD 45/MT. As against the then prevailing market price, the petitioner had arranged coal at the discounted price of around USD 36/MT and below which is evident from the coal price agreement between Adani Enterprises Ltd and Adani Power Ltd. The agreements were for a period of 15-25 years with a provision for escalation @ 10% in a block of every 5 years. The petitioner is stated to have built this low price of coal into the bids submitted to GUVNL and Haryana

Utilities which was the prevailing economics at that point of time. After promulgation the Indonesian Regulations w.e.f. 23.9.2010, all terms supply contracts are to be adjusted to the benchmark index prices within 23.9.2011. It may be seen from the data in Para 52 above that FOB price of coal from Indonesia was USD 89.25/MT and USD 82.28/MT for 5400 kcal/kg and 5000 kcal/kg respectively as the price for 5200 kcal/kg is not available. If we consider the FOB price of coal from Indonesia for 5200 kcal/kg proportionately, it comes to USD 85.76/MT approximately. However, since May 2012, the price of coal has been declining and in March 2013, the FOB price of coal is USD 70.42/MT and USD 65.63/MT. It is further noted that the coal price in the fuel supply agreement is CIF price whereas the spot prices are on FOB basis of the basis of which the petitioner is now purchasing coal. The current ocean freight charge from Indonesia to India ranges from USD 10 to 11/MT (Source: www.platts.com) and accordingly the CIF prices shall further increase after inclusion of ocean freight charges. Therefore, the petitioner is required to incur extra expenditure for import of the coal from Indonesia compared to what has been factored in the levelized tariff. It has been argued that on account of escalation of coal prices subsequent to Indonesian Regulations, the petitioner should arrange coal from alternative domestic and international sources. The situation in domestic coal market at present is not encouraging as CIL is understood to be itself depending on imported coal to meet upto 20% of its commitment under the FSA which is evident from the FSA dated 9.6.2012 between Mahanadi Coal Field Limited and the petitioner. Per force, the petitioner is depending upon the coal from international market, particularly Indonesia for meeting the entire fuel requirement of Phase III and more than 50% of the fuel requirement of Phase IV of the Mundra Power Project. In our view, *prima facie,* the petitioner is adversely hit by the operation of Indonesian Regulations. As regards the possibility of arranging coal from alternate sources in international market, it is noted that apart from Indonesia, South Africa and Australia are the largest exporters of coal. However, the FOB prices of coal from API-4 (South Africa) and Global Coal (Australia) as on 1.3.2013 are USD 84.77/MT and USD 94.46/MT respectively (Source: http://www.djmbp.esdm.go.id). Therefore, sourcing of coal from alternative international market does not, at this moment, appear to be a viable option compared to the Indonesian Market.

54. From the above analysis, we have come to the conclusion that the promulgation of Indonesian Regulations which required the sale price of coal in Indonesia to be aligned with the international benchmark price has, *prima facie,* altered the premise on which the energy charges were quoted by the petitioner in the bids submitted to GUVNL and Haryana Utilities. No doubt, the petitioner had taken huge risk by quoting the energy charges under non-escalable head as a result of which the benefits of escalation index are not available to the petitioner. Though the petitioner had quoted non-escalable energy charges to keep the bid price low, it was however factored on the basis of the then prevailing coal price for import from Indonesia. In fact the petitioner

had got MoUs with two firms for supply of coal from Indonesia at the time of submission of bids and had subsequently acquired interest in the coal mines in Indonesia. The petitioner through its subsidiary had also entered into the long term agreement with coal suppliers in Indonesia at the CIF rate of around USD 36/MT. Moreover, quotation of low bid price was in the interest of the consumers as the power would be available at the levelized tariff as low as ₹2.94/kWh in case of Haryana Utilities and ₹2.34/kWh in case of GUVNL. The petitioner would have continued to supply power at this price, had the Indonesian Regulations not made it mandatory for sale of coal from Indonesia at international bench-mark prices. Therefore, the competitive advantage of hedging in coal prices that the petitioner was enjoying by acquiring mining rights in Indonesia or by entering into long term contract with the coal suppliers in Indonesia appears to have been wiped out, after the coal sales are required to be aligned with international benchmark prices of coal. It is pertinent to note that the coal price in the international market is fluctuating. Therefore, the exact impact of the Indonesian Regulations will vary from time to time. We are also aware that other sources of imported coal are presently costlier than the Indonesian coal and it would not serve any purpose to say that the petitioner has got other viable options to source imported coal. It is also not expected that the petitioner would be able to meet the entire coal requirement from the domestic sources given the availability of domestic coal.

55. It is pertinent to mention that the levelized tariffs discovered at present in the bids invited by the distribution companies in various States are on the higher side and range from ₹3.50/kWh to as high as ₹7.00/kWh. It is understood that the recent bid invited by Uttar Pradesh Power Corporation Limited (UPPCL) under Case-1 (long term), the financial bids opened in December, 2012, reveals that the levelized tariff has been quoted by the bidders in the range of ₹4.4486/kWh to ₹7.100/kWh. (Tariff discovered over the bid is yet to be adopted by UPERC).

56. The Commission is aware that availability of coal from CIL is posing a challenge at present. CIL has expressed its inability to supply the desired quantum of coal causing difficulties for the power plants to even meet their minimum coal requirement equivalent to normative availability. In fact, the Ministry of Power has also recognized the risks associated with fuel procurement and has proposed modifications in the Standard Bidding Documents (SBDs) proposing *inter alia* pass through of fuel cost. In "Overview of the Model Power Purchase Agreement" circulated by the Ministry of Power proposing changes in the existing SBD, it has been stated "since the risks of variation in fuel price cannot normally be managed by the Concessionaire, it must be passed on to the Utility, which, in turn, will have to reflect it in the distribution tariff." The model PPA also goes on to reiterate "since pass through of fuel charge affords full protection to the Concessionaire against potential losses on account of a rise in fuel prices, it follows that the benefit of reduced or concessional fuel prices cannot be retained by the

Concessionaire. As a result, fuel charge cannot be a profit centre for the Concessionaire and the principles for determination of fuel charge must ensure that costs are recovered on the basis of actual, assuming that the Concessionaire would function with the efficiency expected of a prudent and diligent operator."

57. Considered against the prevailing scenario of availability of domestic coal, promulgation of the Indonesian Regulations requiring the existing agreements to align with the International benchmark price has created problems regarding project viability of the generating stations to supply power at the rates agreed to between the parties in the PPAs. Therefore, there is an imminent need to find out a practical and acceptable solution to the problem for ensuring supply of power to the consumers at competitive price while seeking to ensure sustainability of the electricity sector.

58. After coming to the conclusion that the petitioner has a *prima facie* case on account of the increase in coal price due to the impact of Indonesian Regulations, the next question arises as to the nature of relief that can be granted to the petitioner to make the project financially viable. The petitioner has prayed for the relief under Article 12 of the PPAs regarding *''force majeure",* Article 13 of the PPAs regarding "change in law" and regulatory

jurisdiction of the Commission under section 79 of the Act. We have examined the claim of the petitioner under these provisions in the succeeding paragraphs.

Force Majeure

59. The petitioner has claimed relief under Article 12 of the PPAs which pertains to *''force majeure''* events. The petitioner has submitted that the PPAs executed by the petitioner with the respondents provide for *''force majeure''* events which could not be reasonably foreseen and are beyond the control of the parties affected by such events. The petitioner has submitted that change in supply of domestic coal policy by GOI/ CIL and the provisions introduced by the Govt. of Indonesia through the Indonesian Regulations are beyond the control of the petitioner and therefore constitute *''force majeure''* under Article 12.3 read with Article 12.4 of the PPAs, which has substantially increased the petitioner's generation cost, making it commercially impracticable to supply power at the quoted tariff. The petitioner has submitted that occurrence of *''force majeure''* has frustrated the performance of the PPAs as the petitioner could never have envisaged that the existing coal supply agreements would get over ridden by the sudden change in the Indonesian Regulations. The petitioner has submitted that as per Article 12.4 of the PPAs, *'force majeure''* also includes any such event which is unforeseen and in respect of which seller has no control which affects the cost of fuel, *inter-alia* as a consequence of *''force majeure''* event. Further, the exclusion of coal price in Article 12.4

relate to normal increase/decrease in price due to market forces and not substantial increase due to *''force majeure''* events. The petitioner has further submitted that it is prevented from performing its obligation of supplying power at quoted tariff on account of Indonesian Regulations and change in supply of domestic coal policy of Government of India / Coal India Ltd. and hence it is a *''force majeure''* event under Article 12.3 of the PPAs. In support of its contention for *''force majeure''*, the learned counsel for the petitioner relied upon the following judgments:

(a) Sushila Devi and Anr. Vs. Hari Singh and Ors {(1971) 2 SCC 288}.

(b) Transatlantic Financing Corporation Vs. United States, {315 DC Circuit 1966}.

(c) National Presto Industries Vs. United States 380 US 962 (1965)

(d) Holcim (Singapore) Pte Ltd Vs. Precise Development Pte Ltd. & Anr. {(2011) SGCA1}

(e) In Soc. Rumianca Sud. C., Sud 25 (1) Guist CIV 679 (1975)

(f) Aluminium Company of America v Essex Group Inc. 499 F. Supp.53

(g) World Bank Institute Report on Granting and Renegotiating Infrastructure Concessions Doing It Right by J. Luis Guasch.

(h) Article on Regulation and Governance by Jon Stern.

60. The respondents have argued that as per Article 12.3 of the PPAs, the petitioner can claim *"force majeure"* only if there is an event or circumstance or combination of events or circumstances that wholly or partly prevents or unavoidably delays the performance of the petitioner's obligations under the PPA. It has been further submitted that there is no prohibition of any nature under the Indonesian Regulations either wholly or partly on the export from Indonesia or otherwise on the implementation of the fuel supply agreements entered into between the Adani Enterprises Ltd. and Indonesian suppliers for coal. The respondents have submitted that the petitioner had relied upon the MoUs with M/s Coal Orbis Trading, Germany and M/s Kowa Company, Japan at the time of submissions of bid. These MoUs provided for determination of the coal price for each contract year. Therefore, there is no fixed price of coal to be sourced from Indonesia and any changes in the price for any reason cannot be covered under *"force majeure"*. Secondly, the respondents have submitted that though it was open to the petitioner to quote for escalable energy charges which would have aligned the bid to the market prices, the petitioner decided to quote non-escalable energy charges to edge out other bidders and be competitive. The respondents have submitted that the increase in price or terms and conditions of an agreement making the performance onerous or difficult cannot be said to be an event making the performance under *"force majeure"* within the meaning of Article 12.3 of the PPAs or otherwise the agreement to be considered as frustrated under

Section 56 of the Indian Contract Act, 1872. In this connection, learned counsel relied upon the following judgements:

(a) Seaboard Lumber Company and Capital Development Company Vs. United States 308 F.3d 1283.

(b) Ocean Tramp Tankers Corporation Vs. Sovfracht (1964) 1 All E.R. 161.

(c) Continental Construction Co. Ltd. Vs. State of Madhya Pradesh (1988) 3 SCC 82.

(d) Travancor Devaswom Board Vs. Thanath Internation (2004) 13 SCC 44.

(e) Eacom's Controls (India) Ltd. Vs. Bailey Controls Co. and Others AIR 1988 Delhi 365.

(f) Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Anr. AIR 1954 SC 44.

(g) Govindbhai Gordhanbhai Patel and others Vs. Gulam Abbas Mulla Alibhai and others AIR 1977 3SCC 179.

(h) Mohan Lal & Anr. Vs. Grain Chamber Ltd. AIR 1968 SC 772.

(i) The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath AIR 1968 SC 522.

(j) Mugneeram Bangur & Co., Vs. Sardar Gurbachan Singh (1965) SC 1523.

(k) Davis Contractors Vs. Fareham U.D.C. (1956) 2 All E.R., 145.

(l) Ostime Vs. Duple Motor Bodies Limited (1961) 2 All E,.R.,

(m) Suresh Narain Sinha Vs. Akhauri Balbhadra Prasad and others {AIR 1957 Patna 256}.

61. As regards the reliance by the petitioner on the *"force majeure"* exclusions in Article 12.4 of the PPAs, the respondents have submitted that since this Article is an exception to Article 12.3, an event which falls within the scope of Article 12.3, will not be regarded as *''force majeure"* if it falls within the exclusions provided in Article 12.4. The respondents have submitted that it is not open to the petitioner to rely on double negative wordings of Article 12.4 to contend that the said clause independently provides for *''force majeure"* events. The respondents have also refuted the authorities quoted by the petitioner in support of its contention.

62. We have considered the submission of the parties. Article 12.3 of Bids with Haryana Utilities deals with *''force majeure"* and Article 12.4 deals with *''force majeure"* exclusions. The provisions are extracted below:

> ***"12.3 Force Majeure***
>
> *A `Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that **wholly or partly prevents or unavoidably delays an Affected Party** in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices." (emphasis supplied)*
>
> i. Natural Force Majeure Events:
> act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years.

Ii Non-Natural Force Majeure Events:

a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the Seller or the Seller's contractors; or

b) The unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consent required by the Seller or any of the Seller's contractors to perform their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development / operation of the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

c) Any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality which is directed against the project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

2. Indirect Non-Natural Force Majeure Events

a) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; and

b) Radioactive contamination or ionizing radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the site by the Affected Party or those employed or engaged by the Affected Party.

c) Industry wide strikes and labour disturbances having a nationwide impact in India.

12.4 ***''force majeure" Exclusions:***

Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an even of Force Majeure:

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Project;

b. *Delay in the performance of any contractor, sub-contractors or their agents excluding the conditions as mentioned in Article 12.2;*

c. *Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;*

d. *Strikes or labour disturbance at the facilities of the Affected Party;*

e. *Insufficiency of finances or funds or the agreement becoming onerous to perform; and*

f. *Non-performance caused by, or connected with, the Affected Party's;*

g. *Negligent or intentional acts, errors or omissions;*

h. *Failure to comply with an Indian Law; or*

i. *Breach of, or default under this Agreement or any RFP Documents."*

63. It is evident from the above that the *''force majeure"* can be invoked where any event or circumstance or combination of events or circumstances wholly or partly prevents or unavoidably delays the affected parties in the performance of its obligations. The events noted under Article 12.3 are natural *''force majeure"* and non-natural *''force majeure"* events. The case of the petitioner is not covered under any of the categories. Moreover, the Indonesian Regulation does not prevent the petitioner from buying coal from Indonesia or any other source. In fact, the petitioner is stated to be buying coal from Indonesia at the spot price for generation of electricity in its Mundra Power Project. It is a well settled principle of law that increase in prices of a commodity does not lead to impossibility of performance under a contract. In this connection, it is pertinent to mention that the provision of *''force majeure"* provided in the PPAs is made for saving the agreement from being frustrated. The law in relation to *''force majeure"* has been explained by the Hon'ble Supreme Court in M/s Dhanrajmal Gobindram Vs. M/s Shamji Kalidas & Co. AIR 1961 SC 1285 in the following terms **:**

"….An analysis of ruling on the subject into which it is not necessary in this case to go, shows that where reference is made to *''force majeure"*", the intention is to save the performing party from the consequences of anything over which he has no control."

In Alopi Parshad & Sons Ltd. vs. Union of India { AIR (1960) SC 588} it was held as under:

> "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation…"

In the light of the above settled principle of law, it emerges that the parties must have envisaged an event under the *''force majeure"* clause to save them from the consequences of the events over which they do not have any control and must have provided for it in the contract. In the present case, there is no provision in the PPAs to cover the change in procurement of prices as an event of *''force majeure"*. In Case 1 bids, arrangement of fuel is the responsibility of the seller. The petitioner has quoted the entire energy charges as non-escalable element of tariff and thereby eliminating the prospect of being compensated on account of escalation in prices of fuel. The parties have intended that the rise in fuel cost would not be treated as a *''force majeure"* event and accordingly have not factored rise in fuel cost under *''force majeure"*. In Alopi Parshad case, the test laid down is whether the terms of the contract shows that the parties had never agreed to be bound by a fundamentally different situation which has now unexpectedly emerged. In the present case, the parties have never agreed that the petitioner would supply power based on fuel at a fixed price from Indonesia and therefore, change in price of fuel in Indonesia cannot be said to have changed the original situation. Sourcing of fuel from Indonesia as per the rates agreed in the Coal Supply Agreement is a decision between Adani Power Limited and Adani Enterprises Ltd which decision could be said to be affected by *''force majeure''* under the Coal Supply Agreement and cannot bind the respondents who are neither parties to the Coal Supply Agreement nor the PPAs were premised on the basis of said Coal Supply Agreement. Therefore, Indonesian Regulations affecting the agreed price under Coal Supply Agreement cannot be said to be a *''force majeure''* event under the PPAs with the respondents. Article 12.4 of the PPAs are exclusions to Article 12.3 which means that even if any event falls within the scope of Article 12.3, it will not be regarded as *''force majeure''* if it falls within the exclusion provided in Article 12.4. Even the double negative in Article 12.4.(a) which provides that "unavailability, late delivery or changes in cost of plant, machinery, equipment, materials, spare parts, fuel or consumables for the project" shall be considered as *''force majeure''* if they are consequences of the events of *''force majeure''* cannot advance the case of the petitioner. The PPAs do not provide that the petitioner shall supply power by procuring coal from Indonesia under the Coal Supply Agreement between the petitioner and respondents and therefore, the Indonesian Regulations requiring the coal export at the international benchmark price cannot be said to be a *''force majeure''* event affecting the price of fuel under the PPAs.

64. The petitioner has submitted that change in supply of domestic coal policy by GOI/CIL and the prohibition introduced by Government of Indonesia through Indonesian Regulations are circumstances beyond the control of the petitioner and constitute "*force majeure*" events under Article 12 of the PPAs with the respondents. It is noted that the PPAs were not premised on the availability of full coal linkage by Government of India or Coal India Ltd. For the Phase III of the Project, the petitioner had submitted the MoUs from Kowa Company and Coal Orbis and a commitment letter from GMDC. All these MoUs did not result in Fuel Supply Agreement. The petitioner made its application to the Standing Linkage Committee (Long Term), Ministry of Coal for coal linkage for the entire capacity of the project (i.e. 4620 MW) on 28.1.2008 after the petitioner has been awarded the LoIs by the respondents. Therefore, it follows that the bids were not premised on the coal linkage to be provided by Ministry of Coal under the New Coal Development Policy. In case of GUVNL, the petitioner contracted for the coal by entering into a Coal Supply Agreement with Adani Enterprises Ltd. on 24.3.2008. Therefore, change in Government policy to allocate 70% of the coal requirement of coastal projects cannot be considered as a "force majeure" event affecting the petitioner. In case of Haryana bid, the petitioner entered into a Fuel Supply Agreement with Adani Enterprises Ltd. on 15.4.2008 for import of coal from Indonesia, even before the issue of letter of assurance by Standing Linkage Committee. Moreover, the petitioner has got the linkage for Phase-IV of the project as per the policy of the Government. Non-availability of full coal linkage cannot be

considered as a force majeure event. As regards the impact of Indonesian Regulations, we are of the view that the said regulation neither prohibits nor delays the petitioner in performance of its duties under the PPAs. The petitioner is required to pay more for the coal in comparison to the price agreed in the Coal Supply Agreements as a result of Indonesian Regulations, but the said regulations have not rendered the PPAs impossible to perform. In our view, no case is made out in favour of the petitioner under Article 12 of the PPAs.

Change in Law

65. The petitioner has stated that the energy charges in the levelized tariff agreed to in the PPAs dated 7.8.2008 for Haryana Utilities was quoted by the petitioner in the bids having regard to the then prevailing Government of India's Policy on coal linkage. HPGCL issued RfQ on 25.5.2006 and the bid was submitted by the petitioner on 24.11.2007. Thereafter, LOA dated 25.6.2009 was issued to the petitioner for coal linkage equivalent to 70% capacity, due to the decision to restrict grant of linkage to coastal power plants for only 70% capacity from domestic sources of Coal India Limited as per SLC (LT) meeting held on 12th November 2008. The entire claim of the petitioner is based on the circumstance of reduction of domestic coal capacity to 42% of the capacity under the Coal Supply Agreement dated 19.6.2012 with Mahanadi Coal Fields Ltd from that of 70% under the Standing Linkage Committee (LT) Minutes of Meeting and consequent purchase import of coal

at enhanced quantum that is, from the earlier contemplated 30% to 58% that too at a higher price from Indonesia. The main question that arises is whether on account of reduction in allocation of domestic coal, the purchase of coal from Indonesia can be considered as “change in law”. The provisions of 'law' and “change in law”' as provided in the PPA with Haryana Utilities are extracted below:

> "Law" means, 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 all applicable rules, regulations, orders, notifications by an Indian Government Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission."
>
> "13.1.1 "Change in Law“ means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:
>
> (i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of Law, tribunal or Indian Governmental Instrumentality is final authority under a law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which result in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement'
>
> but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI charges or frequency intervals by an Appropriate Commission.
>
> Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a "change in law” (applicable only in case the Seller envisaging supply from the Project awarded the status of "Mega Power Project" by Government of India)."

66. The petitioner has argued that the term as defined in the PPAs is qualified by the word "all" and therefore the question whether law in “change in law”" should include foreign laws or be restricted to Indian Law must be understood in the context of PPAs, which is a contract to supply power based on imported coal. The petitioner has submitted that the express and underlying purpose of Article 13 of PPAs is to make the PPAs work by providing compensation and restitute a party affected by “change in law” to a position as if such “change in law” had not taken place. Any restricted meaning to the term law can only be given by adding words to the PPAs, which the party chose not to do. The petitioner has submitted that the promulgation of Indonesian Regulations and consequent escalation of fuel price was not and could not have been foreseen nor can be controlled by the petitioner. Such being the case, if the tariff quoted in the PPAs is not revised to include escalation of fuel cost, then it would be commercially impossible on the part of the petitioner to perform its obligations under the PPAs. The petitioner has further submitted that the words "including" occurring in the definition of law cannot restrict the wider term used before "including" and therefore, “all laws” appearing before the word "including" shall refer to “all laws” including foreign laws and cannot be restricted to the laws of India only. Relying on the principle of *contra proferentem,* the petitioner has submitted that in case of ambiguous term, the interpretation of law should be construed in favour of the party, who did not insist on its inclusion. Therefore, the term 'law' should be interpreted in favour of the petitioner.

67. The respondents have argued that Indonesian Regulations do not amount to “change in law” within the meaning of Article 13 of the PPAs. The respondents have urged that the term law is a defined term in PPAs and can only cover Indian Law and not the law of any other country. The respondents have further submitted that the expression "all laws including Electricity Laws in force in India" should be interpreted as Indian Law including Electricity Laws. The respondents have submitted that if the petitioner's interpretation is accepted, then whenever any law changes anywhere in the world having the slightest impact on Indonesia will get covered under the PPAs. The respondents have argued that the PPAs cannot be subjected to laws of other countries, unless explicitly specified.

68. We have considered the submissions of the parties. In our view, "all laws" would refer to the laws of India, which includes Electricity Laws. An examination of the various provisions of the PPAs show that only Indian Laws are applicable. Moreover, the term governing laws has been defined in the PPAs as the laws of India. If the term "all laws" is interpreted as to include the foreign law, it will lead to absurd results as any change in foreign law would be given effect to, which would result in the changes in the rights and liabilities of the parties under the contract. In our view, if any foreign law can be made applicable, it should be specifically provided for in the contract. For example, in some international contracts, the adjudication of the dispute is conferred on the courts of a third country. In the absence of any provision in the PPAs that

the “change in law” of the fuel exporting country would have to be given effect to as “change in law” under the PPAs, change in the Indonesian Regulations cannot be considered as “change in law”.

69. The petitioner has submitted that after the promulgation of Indonesian Regulations, the fuel cannot be supplied at the agreed rate as it would result in violation of the regulations / laws of Indonesia. The petitioner has submitted that the change in license / consent to the mining companies is a change in the consent for the project and consequent non-supply at the agreed price is on account of change in law. We have already held that Indonesian Law cannot be covered under the definition of 'law' under the provisions of PPAs. Moreover, the Indonesian Regulations has not prohibited extraction of coal from its mines and export to other countries including India. In fact, there is no change in consent or license. In any case, this cannot bind the petitioner since it is not a party to the Fuel Supply Agreement from the mining companies of Indonesia. The petitioner has further submitted that change in allotment policy of domestic coal is covered under the purview of change in law provision. Since the petitioner applied for linkage of domestic coal to Coal India Ltd on 28.1.2008 after the petitioner was awarded LoI by GUVNL and Haryana Utilities, it cannot be said that the bids were premised on the linkage of domestic coal, and hence the change in policy of GoI/CIL cannot be considered as “change in law”.

Relief under Section 79 read with Section 63 of the Act

70. We have come to the conclusion that considering the peculiar nature of the PPAs which totally vests the fuel risks on the petitioner, the effect of price escalation of coal as a result of Indonesian Regulations cannot be covered under the provisions of "change in law"' or *''force majeure'*". We have to consider whether any relief can be provided to the petitioner under the power of the Commission under section 79(1)(b) of the Act. It has been submitted on behalf of the Petitioner that this Commission has jurisdiction under Section 79 of the Electricity Act, 2003 and is empowered under the extant legal and regulatory framework read with the PPAs to regulate tariff of generating companies which have a composite scheme for generation and sale of electricity in more than one State under Section 79(1)(b) of the Act and have statutory function of adoption of tariff under Section 63 read with power to revise tariff under Section 62 of Act. The Commission can adjudicate upon any dispute regarding claim for any change in or regarding determination of tariff or any tariff related matters, or which partly or wholly could result in change in tariff (Para 4.7 and 5.17 of Competitive Bidding Guidelines read with Article 17.3 of PPAs) and adjust the tariff to restitute the economic impact of "change in law" (Article 13 of PPAs).

71. It has been submitted on behalf of the respondents that once the tariff was adopted pursuant to the competitive bidding finalized under section 63 of the Act, the same cannot be altered or revised. It has been submitted that the

rights and obligations of the parties are to be decided and enforced in terms of the provisions of the PPAs signed pursuant to the competitive bidding process under Section 63 of the Act. The respondents have submitted that the petitioner is under an obligation to generate and supply electricity to GUVNL and Haryana Utilities at the tariff and on terms and conditions contained in the PPAs. The Petitioner cannot claim any deviation from the terms and conditions of the PPAs, after having entered into the PPAs pursuant to the bid submitted by quoting non-escalable fuel energy charges. The Petitioner is attempting to convert a tariff based competitive bidding finalized under Section 63 of the Act to a tariff determination process under Section 62 of the Act. Section 63 is an exception to section 62 and section 64 (5) and reference to section 61 is not relevant because once the tariff was adopted pursuant to the competitive bidding finalized under section 63 of the Act, the same cannot be altered or revised for the reasons contained in section 61 or under section 62 (4) of the Act.

72. We have considered the submissions of the parties. Though the case of the petitioner does not fall under either *''force majeure"* or "change in law", it cannot be denied that the petitioner who is dependent to a large extent on the imported coal for running the Mundra Power Project can be said to be immune from the impact of the Indonesian Regulations which made it compulsory for the sellers of coal from Indonesia to align the sale prices with the international benchmark price. It has been brought to our notice that there is a perceptible

difference between the prices which *were prevalent prior to the Indonesian Regulations and those prevalent* subsequent to the Indonesian Regulations. Even if we consider the then prevailing international price of coal at the time of submission of the bids by the petitioner and the international prices prevalent now, there is vast difference between the two. Therefore, the tariff of the project quoted by the petitioner which was premised on the prices of the coal agreed in the Coal Supply Agreement would be rendered commercially unviable if the plant is run on the basis of the imported coal purchased from Indonesia at the international price, which makes the operation of the power plant commercially unviable. We have already come to the conclusion in para 54 of this order that the petitioner is suffering on account of escalation of sudden increase in coal price subsequent to the promulgation of Indonesian Regulations and the petitioner deserves to be compensated to make the project commercially viable to operate and supply power to the respondents in terms of the PPAs.

73. It has been vehemently argued by the respondents that change in price cannot be the cause for frustration of contract. In our view, each case should be dealt with on its own merit. While it is expected that the parties to the contract would factor all possible contingencies including price escalation, there are certain events which are beyond the contemplation of the parties and if the impact of such events are not taken into account, it would render the contract unworkable. If the price escalation is on account of some event which was beyond the contemplation of the parties, then the impact of price variation

needs to be duly considered and addressed in order to enable the parties to continue to perform their obligations under the contract. Hon'ble Supreme Court in Continental Construction Company Limited Vs. State of Madhya Pradesh [AIR 1988 SC 1166] has held as follows:

> "The question about specific reference on a question of law was examined by this Court recently in the case of Tarapore and Company Vs. Cochin Shipyard Limited, Cochin (1984)2 SCC 680; AIR 1984 SC 1072). There it was observed that if the agreed fact situation, on the basis of which agreement was entered into, ceases to exist, an agreement to that extent becomes otiose. <u>If rates initially quoted by the contractor became irrelevant due to subsequent price escalation, it was held in that case that the contractors claim for compensation for the excess expenditure due to price rise could not be turned down on the ground of absence of price escalation clause in that regard in the contract. Agreement as a whole has to be read. Reliance was placed very heavily on this decision on behalf of the Appellant before us.</u> It has to be borne in mind that in the instant case there are specific clauses referred to hereinbefore which barred consideration of extra claims in the event of price escalation. That was not so in Tarapore and Company case. That made all the difference. The basis of bargain between parties in both these cases were entirely different."

Further, in the case of Tarapore and Company Vs. Cochin Shipyard, Cochin (1984)2 SCC 680, the Hon'ble Supreme Court inter alia held as follows:

> "These clauses were presumably referred to in to context of an argument that <u>the price escalation clause does not cover the claim for compensation for additional expenditure on imported plant and machinery and technical know-how, because the contract substantially provides for the same to be suppied by the contractor.</u> In our opinion, this over-simplification of the clauses of the contract involving works of such magnitude is impermissible. The whole gamut of discussions, negotiations, and correspondence must be taken into consideration to arrive at a true meaning of what was agreed to between the parties."

74. The principles that emerge from the above judgements is absence of a clause for price escalation in the contract cannot be the ground for denying the compensation on account of actual expenditure on account of price rise. Therefore, if the actual cost of production of electricity goes beyond what was agreed in the PPAs, compensation should not be denied merely on the ground that there is no provision in the PPAs. Therefore, in our view, ways and means need to be found to compensate the petitioner for the loss or additional expenditure incurred by it on account of procurement of coal from Indonesia at the international benchmark price as it was never in the contemplation of the petitioner and even the respondents that purchase price of coal from Indonesia will increase manifold on account of promulgation of Indonesian Regulations.

75. The Statement of Objects and Reasons accompanying the Electricity Bill 2001, which led to enactment of the Electricity Act *inter alia* provides that

> "*1.3 Over a period of time, however, the performance of SEBs has deteriorated substantially on account of various factors. For instance, though power to fix tariffs vests with the State Electricity Boards, they have generally been unable to take decisions on tariffs in a professional and independent manner and tariff determination in practice has been done by the State Governments. Cross-subsidies have reached unsustainable levels. To address this issue and to provide for distancing of government from determination of tariffs, the Electricity Regulatory Commissions Act, was enacted in 1998. It created the Central Electricity Regulatory Commission and has an enabling provision through which the State governments can create a State Electricity Regulatory Commission. 16 States have so far notified/created State Electricity Regulatory Commissions either under the Central Act or under their own Reform Acts.*"

"3. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonising and rationalising the provisions in the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 in a new self-contained comprehensive legislation arose. Accordingly it became necessary to enact a new legislation for regulating the electricity supply industry in the country which would replace the existing laws, preserve its core features other than those relating to the mandatory existence of the State Electricity Board and the responsibilities of the State Government and the State Electricity Board with respect to regulating licensees. There is also need to provide for newer concepts like power trading and open access. There is also need to obviate the requirement of each State Government to pass its own Reforms Act. The bill has progressive features and endeavours to strike the right balance given the current realities of the power sector in India. It gives the State enough flexibility to develop their power sector in the manner they consider appropriate. The Electricity Bill, 2001 has been finalised after extensive discussions and consultations with the States and all other stake holder and experts."

76. The Statement of Objects and Reasons makes it clear that the Electricity Regulatory Commissions at the Centre and in the States have been established as independent institutions to discharge the functions assigned under the statutes under which they have been established. Another objective in accordance with the Statement of Objects and Reasons is to encourage private sector participation in generation, transmission and distribution of electricity. The objects of the Act are further set out in the long title, reproduced below:

"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies constitution of Central Electricity

Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

77. From the long title of the Act it follows that its objectives include taking of measures conducive to development of electricity industry, promotion of competition, protection of the interest of the electricity consumers as also the rationalisation of the electricity tariff.

78. The issues raised in the present context relate to tariff. The provisions relating to determination of tariff are contained in Part VII of the Act, comprising Sections 61 to 66. The tariff for the commercial activities of generation, transmission, distribution and supply of electricity undertaken under the Act is determined by the Appropriate Commission by specifying the terms and conditions for the purpose as laid down in Section 61. The factors that guide the Appropriate Commission while specifying the terms and conditions for determination of tariff have been prescribed under Section 61 which reads as under:

> *"61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*
>
> *(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
>
> *(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
>
> *(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

79. From clause (d) of Section 61 it is seen that safeguarding of the interest of the consumers of electricity is one of the factors to be considered by the Appropriate Commission while specifying the terms and conditions. However, while safeguarding the interest of the consumers, the Appropriate Commission has to ensure recovery of cost of generation, transmission, distribution and supply of electricity in a reasonable manner. In other words, in accordance with Section 61, the Appropriate Commission has to strike a balance between the consumers' interest and the investors' (generating company, transmission licensee and distribution company) interest, with emphasis on the need for applying commercial principles in conducting the activities of generation, transmission, distribution and supply of electricity.

80. Section 3 of the Act makes provision for formulation and review from time to time of the National Electricity Policy and the Tariff Policy by the Central Government and National Electricity Plan by the Central Electricity Authority. Section 3 of the Act the relevant portion of which is extracted hereunder thus accords statutory status to the National Electricity Policy and the tariff policy:

> ***"3. National Electricity Policy and Plan.--*** *(1) The Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.*
>
> *(2) The Central Government shall publish National Electricity Policy and tariff policy from time to time.*
>
> *(3) The Central Government may, from time to time, in consultation with the State Governments and the Authority, review or revise, the National Electricity Policy and tariff policy referred to in sub-section (1).*
>
> *(4)...*
>
> *(5)..."*
> .

81. The salient features of the National Electricity Policy are that it lays down the guidelines for (a) accelerated development of the power sector, (b) providing supply of electricity to all areas and (c) protecting interests of consumers and other stakeholders, the investors being one category of such stakeholders. One of the objectives sought to be achieved under the National Electricity Policy is the financial turnaround and commercial viability of the electricity sector since the performance of SEBs, the major players in the sector had deteriorated substantially over a period of time. Accordingly, the

National Electricity Policy addresses the issues of recovery of cost of services to make the electricity sector sustainable, promotion of competition which ultimately benefits the consumers and protection of consumers' interests, among others. The National Electricity Policy further recognises the need for providing adequate return on investment so that the electricity sector is able to attract adequate investments. The Tariff Policy has been formulated with the similar objectives in contemplation. The relevant provisions of the National Electricity Policy, 2005 and the Tariff Policy of 2006, referred by learned counsel for the petitioner, are extracted hereunder for facility of reference:

National Electricity Policy

*"**1.0 INTRODUCTION***

1.6 Electricity Act, 2003 provides an enabling framework for accelerated and more efficient development of the power sector. The Act seeks to encourage competition with appropriate regulatory intervention. Competition is expected to yield efficiency gains and in turn result in availability of quality supply of electricity to consumers at competitive rates.

1.8 The National Electricity Policy aims at laying guidelines for accelerated development of the power sector, providing supply of electricity to all areas and protecting interests of consumers and other stakeholders keeping in view availability of energy resources, technology available to exploit these resources, economics of generation using different resources, and energy security issues.

2.0AIMS AND OBJECTS

The National Electricity Policy aims at achieving the following objectives:

-
-
-
-
-
- *Financial turnaround and commercial viability of the Electricity sector.*
- *Protection of consumers' interests.*

4.0 ISSUES ADDRESSED

The policy seeks to address the following issues:

-
-
- *Recovery of cost of services and Targetted Subsidies.*
-
- *Competition aimed at Consumer Benefits*
-
- *Protection of Consumer interests and Quality Standards*

5.1 RURAL DEVELOPMENT

5.1.6 Necessary institutional framework would need to be put in place not only to ensure creation of rural electrification infrastructure but also to operate and maintain supply system for securing reliable power supply to consumers.

5.5 RECOVERY OF COST OF SERVICES & TARGETTED SUBSIDIES

5.5.1 There is an urgent need for ensuring the recovery of cost of service from Consumers to make the power sector sustainable.

5.8 FINANCING POWER SECTOR PROGRAMMES INCLUDIN PRIVATE SECTOR PARTICIPATION

5.8.2 It would, therefore, be imperative that an appropriate surplus is generated through return on investments, and, at the same time, depreciation reserve created so as to fully meet the debt service obligation. This will not only enable financial closure but also bankability of the project would be improved for expansion programmes, with the Central and State level public sector organisations, as also private sector projects, being in a position to fulfil their obligations toward equity funding and debt repayments.

5.8.4 Capital is scarce. Private sector will have multiple options for investments. Return on investment will, therefore, need to be provided in a manner that the sector is able to attract adequate investments at par with, if not in preference to, investment opportunities in other sectors. This would obviously be based on a clear understanding and evaluation of opportunities and risks. An appropriate balance will have to be maintained between the interests of consumers and the need for investments."

Tariff Policy

"4.0 OBJECTIVE OF THE POLICY

The objectives of this tariff policy are to:

(a)..

(b) Ensure financial viability of the sector and attract investments.

(c)..

(d)...

5.0 GENERAL APPROACH TO TARIFF

5.3 Tariff policy lays down following framework for performance based cost of service regulation in respect of aspects common to generation, transmission as well as distribution. These shall not apply to competitively bid projects as referred to in para 6.1 and para 7.1 (6). Sector specific aspects are dealt with in subsequent sections.

*(a)**Return on Investment***

Balance needs to be maintained between the interests of consumers and the need for investments while laying down rate of return. Return should attract investments at par with, if not in preference to, other sectors so that the electricity sector is able to create adequate capacity. The rate of return should be such that it allows generation of reasonable surplus for growth of the sector."

82. The common threads running along the length and breadth of the statutory scheme under the Act and the statutory instruments framed thereunder are the protection of the consumers' interest and ensuring adequate return on the investments in the sector. The consumers' interest is protected not only by fixing competitive tariff but it is equally imperative to ensure continuous, uninterrupted and reliable supply of electricity. For the purpose of qualitative supply of electricity, it is necessary that adequate investments are made for creating infrastructure for generation, transmission, distribution and supply of electricity and this is possible only when the investor gets adequate return on the investments made. Therefore, in the final analysis, the recovery of costs of the investors serves the consumers' interest by attracting investments in the sector by improving quality of supply of electricity to the consumers. Thus, twin objectives of protection of consumers' interest and recovery of cost of services provided are complementary. All the authorities established under the Act, have to strive towards achieving these

objectives. This Commission as the apex regulatory body for power sector has the additional responsibility for meeting the objectives of law.

83. We have come to a conclusion in para 54 of this order that the escalated price at which the petitioner is buying coal from Indonesia subsequent to the promulgation and operation of Indonesian Regulations for supply of power to the respondents has rendered the project unviable which will adversely affect the electricity sector and interest of the consumers. The possibility of the petitioner's inability to discharge its obligations under the PPAs on the face of the high cost of Indonesian Coal cannot be totally ruled out which will affect the consumers in two ways. Firstly, the respondents shall be required to invite fresh bids and till the selected project or projects are operationalised, the consumers will be deprived of power. Secondly, the ruling tariff for the new projects discovered through competitive bidding works out in the range of ₹3.5/kWh to ₹7.00/kWh which the consumers of Mundra Power Project shall also be required to pay. At macro level, it will be a serious setback for the electricity sector and will adversely affect the investment for the sector. Accordingly, as a regulatory body, this Commission deems its responsibility to intervene in the matter in the interest of the consumers, investors and the power sector as a whole to consider adjustment in tariff in view of the unanticipated increase in price of imported coal. This Commission cannot remain oblivious to the interest of consumers and lenders.

84. Further, the above view is in conformity with this Commission's power

under clause (b) of sub-section (1) of Section 79 of the Act to regulate the tariff of the generating companies having a composite scheme for generation and sale of electricity in more than one State. The Hon'ble Supreme Court has held in a number of cases that the power to "regulate" confers plenary power over the subject matter of regulation. The term 'regulate' is very wide. The Hon'ble Supreme Court in its judgments has interpreted the expression 'regulate' as under:

(a) **Jiyajeerao Cotton Mills Ltd. Vs. M.P.Electricity Board 1989 SCC Supl.(2) 52**

"The word 'regulate' has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, and the court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied."

(b) ***D.K. Trivedi & Sons Vs. State of Gujarat 1986 SCC Supl.20***

"The word 'regulate' means 'to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings."

(c) ***V. S. Rice and Oil Mills & Others Vs. State of A.P. AIR 1964 SC 1781***

"The word 'regulate' is wide enough to confer power on the State to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices."

(d) ***K. Ramanathan Vs State of Tamil Nadu & Anr. (1985)SCC (2) 116***

"The word 'regulate 'is variously defined as meaning to adjust; to order or govern by rule, method or established mode. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and the power must be regarded as plenary. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed."

85. The next question to be considered is the kind of relief that may be granted at this stage. Learned counsel for the petitioner, based on certain studies, conducted by World Bank and others argued that renegotiation and readjustment of contractual obligations in the case of long-term contracts is the internationally accepted norm since long-term contracts are considered to be incomplete in the sense that it is not possible for the parties to precisely and adequately foresee all future developments having implications on viability of such contracts. A reference to the various works/studies quoted by learned counsel has been made above while noting down his submissions. UNIDROIT principles recognise 'hardship' as the basis of renegotiation of the long-term contracts. The other study from which the sustenance was drawn by learned counsel for the petitioner was by J. Louis Guasch. Learned counsel for the respondents has submitted that the analysis in the study by J. Louis Guasch applied to future contracts only and not to concluded contracts.

86. Some of the relevant and important findings of John Stern and J. Louis Guasch quoted by the learned counsel for the petitioner are recalled for taking a progressive decision by this Commission in introducing renegotiation:

- ✓ To revise the terms of contract, the parties must both agree to renegotiate its terms. If the renegotiation is unsuccessful, the contract collapses;
- ✓ All long-term contracts are incomplete and it is not always possible to imagine all possible contingencies;

- ✓ On the basis of experience in developing countries and in some continental European countries, it has been found that Governments often establish semi independent or independent monitoring and enforcement agencies who have the power to review and in particular to modify these contracts following a review instituted either by the buyer or by the seller;
- ✓ In the long-term contracts spreading over twenty one years and above, prices may need to be varied sharply in unpredictable ways because of major commodity price shocks and/or exchange rate crisis;
- ✓ In many cases, the need for major renegotiations and the high rates of cancellation for concession contracts involving investment commitments represent major regulatory failures. There are no provisions for negotiation and absence of genuine independence to regulators to revisit the tariff;
- ✓ External regulator could help align trust perceptions, for example, through dispute resolution methods, periodic and emergency reviews and so on;
- ✓ Allowing some room for renegotiation and regulatory adoption may seem appropriate and socially desirable in the fact of new problems, changed circumstances and additional information and experience;
- ✓ Opportunistic renegotiation should be discouraged in both existing and future concessions. The key issue is how to design better concession contracts and how to induce both parties to comply with the agreed

upon terms of the concession to secure long term sector efficiency and vigorous network expansion;

- ✓ Restoration of financial equilibrium should clearly specify the capital base on which the firm is allowed to earn a fair return;
- ✓ Another element that needs to be very clearly stated in the financial equilibrium clause of the contract is the period of application. The period of application refers to the period of time over which the financial equilibrium is evaluated and in principle it could range from one year to life of the concession. Both these extreme points are inappropriate; A three to five year period seems more appropriate. The financial equilibrium should not bail the operator out for adverse realisations of normal commercial risk;
- ✓ When facing petitions for renegotiation, the sanctity of the bid contract must be upheld. The operator should be held accountable for its submitted bid. The financial equation set by the winning bid should always be the reference point and the financial equilibrium behind the bid should be restored in the event of renegotiation or adjustment;
- ✓ Renegotiation should not be used to correct for mistakes in bidding or for overtly risky or aggressive bids.

87. Though the study provides sufficient guidelines for renegotiation of all long-term contracts in the light of the international practice, we are not inclined to favour any re-negotiation of the tariff discovered through the process of competitive bidding as in our view, the sanctity of the bids should be maintained. The parties should not renegotiate the tariff discovered through the competitive bidding as that will bring uncertainty to the power sector and is prone to misuse. In our view, the parties should confer to find out and agree

for a compensation package to deal with the impact of subsequent event resulting from the operation of Indonesian Regulations which has adversely affected performance under the PPAs while maintaining the sanctity of the PPAs and the tariff agreed therein. In other words, the compensation package agreed should be over and above the tariff agreed in the PPAs and should be admissible for a limited period till the event which occasioned such compensation continues to exist and should also be subject to periodic review by the parties to the PPAs.

88. In the present case, the escalation in price of imported coal on account of Indonesian Regulation and non-availability of adequate fuel linkage from Coal India Limited for the project of the petitioner is a temporary phenomenon and is likely to be stabilized after some time. Therefore, the petitioner needs to be compensated for the intervening period with a compensation package over and above the tariff discovered through the competitive bidding. The compensation package to be called 'compensatory tariff' could be variable in nature commensurate with the hardship that the petitioner is suffering on account of the unforeseen events leading to non-availability of coal linkage or increase in international coal price affecting the import of coal which has affected its performance under the PPAs. As and when the hardship is removed or lessened, the compensatory tariff should be revised or withdrawn. In our view, this is the most pragmatic way to make the PPAs workable while ensuring supply of power to the consumers at competitive rates.

89. We are also conscious of our statutory responsibility to balance the interest of the consumers with the interest of the project developers while regulating the tariff of the generating companies covered under our jurisdiction. In our view, under the peculiarity of the facts of the case and keeping in view the interest of both project developer and consumers, there is a need to direct the parties to set down to a consultative process to find out an acceptable solution in the form of compensatory tariff over and above the tariff decided under the PPAs to mitigate the hardship arising out of absence of full domestic coal linkage and the need to import coal at benchmark price on account of Indonesian Regulations. Accordingly, we direct the petitioner and the respondents and the respective State Governments to constitute a committee within one week from the date of this order. The committee shall consist of the Principal Secretary (Power), Govt. of Gujarat / Managing Director of GUVNL and Principal Secretary (Power), Govt. of Haryana / Managing Directors of UHBVNL and DHBVNL, the Chairman of Adani Power Ltd. or his nominee, an independent financial analyst of repute and an eminent banker of the commensurate level. The nominees of financial analysts and banker should be selected on mutual consent basis. The Committee shall go into the impact of the price escalation of the Indonesian coal on the project viability and obtain all the actual data required with due authentication from independent auditors to ascertain the cost of import of coal from Indonesia and suggest a package for compensatory tariff which can be allowed to the Petitioner over and above the tariff in the PPAs. The

Committee shall keep in view inter-alia the following considerations while working out and recommending the compensatory tariff applicable upto a certain period:

(a) The net profit less Govt. taxes and cess etc. earned by the petitioner's company from the coal mines in Indonesia on account of the bench mark price due to Indonesian Regulation corresponding to the quantity of the coal being supplied to the Mundra Power Project should be factored to pass on the same in full to the beneficiaries in the compensatory tariff.

(b) The possibility of sharing the revenue due to sale of power beyond the target availability of Mundra Power Project to the third parties may be explored.

(c) The possibility of using coal with a low GCV for generation of electricity for supply to the respondents without affecting the operational efficiency of the generating stations.

90. The Committee is also at liberty to suggest any further measures which would be practicable and commercially sensible to address the situation. The Committee shall submit its report to the Commission by 30th April 2013 for consideration and for further directions.

91. The petitioner has prayed as an alternative prayer to declare that the applicant is discharged from the performance of the PPAs on account of frustration due to subsequent events. The petitioner has further prayed that during pendency of the present petition, the Commission may direct the

respondents to procure power on cost plus basis or alternatively suspend the PPAs till the final disposal of the petition. Since, we have come to the conclusion that there is no case for "*force majeure*" and "change in law", the PPAs are not frustrated and therefore, the prayers cannot be granted. As regards the prayer at para (c), the same will be decided in the light of the recommendations of the Committee.

Sd/-	Sd/-	Sd/-
(M Deeena Dayalan)	**(V.S.Verma)**	**(Dr. Pramod Deo)**
Member	**Member**	**Chairperson**

<u>Per Shri S. Jayaraman, Member</u>

I respectfully disagree with the findings arrived at in this order. I shall dwell upon the issues in my order separately.

Sd/-
(S. Jayaraman)
Member