CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 155/MP/2012

Coram:

Shri Gireesh B. Pradhan, Chairperson
Shri A. K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Date of Order: 6th December, 2016

In the matter of

Petition 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 Regulations by Indonesian Government

And In the matter of

Adani Power Limited
Adani House, Plot No. 83
Institutional Area,Sector-32
Guargaon-122001, Haryana **.....Petitioner**

Vs

1) Uttar Haryana Bijili Vitran Nigam Limited
Vidyut Sadan, C-16, Sector 6
Panchkula, Haryana

2) Dakshin Haryana Bijli Vitran Nigam Limited
Vidyut Sadan, Vidyut Nagar
Hisar-125005, Haryana

3) Gujarat Urja Vikas Nigam Ltd.
Sardar Patel Vidyut Bhawan, Race Course,
Vadodara-390007, Gujarat

4) Prayas Energy Group
Unit III A & B, Devgiri
Joshi Railway Museum lane
Kothrud Industrial Area
Kothrud, Pune, MH 411038 INDIA

Parties Present:

Dr. Abhishek Manu Singhvi, Sr. Advocate, APL
Shri Vikram Nankani, Sr. Advocate, APL
Shri Amit Kapur, Advocate, APL
Ms. Poonam Verma, Advocate, APL
Shri Akshat Jain, Advocate, APL
Shri Gaurav Dudeja, Advocate, APL
Shri Apoorva Misha, Advocate, APL
Shri Abhishek Munot, Advocate, APL
Shri Kunal Kaul, Advocate, APL
Shri Jignesh Lungalia, APL
Shri L.N. Sharma, APL
Shri S. Kalita, APL
Shri Malav Deliwala, APL
Shri Jatin Jalundhwala, APL
Shri Nitish Gupta, Advocate, GUVNL
Shri M. G. Ramachandran, Advocate, Prayas Energy
Ms. Ranjitha Ramachandran, Advocate, Prayas Energy
Ms. Anushree Bardhan, Advocate, Prayas Energy
Ms. Poorva Saigal, Advocate, Prayas Energy
Shri Shubham Arya, Advocate, Prayas Energy
Shri Ashwin Chitnis, Prayas Energy
Shri S.K. Nair, GUVNL
Shri N.A. Patel, GUVNL
Shri Shashank Kumar, APL
Shri Savan Path, APL
Shri Tanmay Vyas, APL
Shri Sanjay N, Advocate, APL
Shri G. Umapathy, Advocate, Haryana Discom
Ms. R. Mekhala, Advocate, Haryana Discom
Shri Vikrant Saini, HPPC
Shri Ravi Juneja, HPPC
Shri Saurav Suman, HPPC

ORDER

Background of the Case

The Petitioner, Adani Power Limited, 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 PPAs dated 7.8.2008 to the Haryana Utilities.

(A) PPA dated 2.2.2007 with GUVNL

2. On 1.2.2006, Gujarat Urja Vikas Nigam Ltd (GUVNL) 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 Chhattisgarh 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 Chhattisgarh. 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 Chhattisgarh. At the instance of GUVNL, GERC adopted the tariff under Section 63 of the Electricity Act, 2003

(hereinafter “the 2003 Act”) on 20.12.2007 and also approved the PPA under clause (b) of sub-Section (1) of Section 86 of the 2003 Act.

3. 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-fulfillment of conditions subsequent in accordance with the PPA due to non-materialization of FSA 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 was 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 Hon'ble Appellate Tribunal for Electricity (the Appellate Tribunal) 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 of the coal supplies from Indonesian mines and upheld the order of GERC. The Petitioner has challenged the said judgement before the Hon'ble Supreme Court in Civil Appeal No. 11133 of 2011. Since there is no stay on the judgement of the Appellate Tribunal, the Petitioner has been supplying power to GUVNL by importing coal from Indonesia through Adani Enterprises Limited.

PPA dated 7.8.2008 with Haryana Utilities

4. 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 (RfQ) 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 Coal Orbis Trading GMBH and Kowa Company Ltd, Japan respectively. The Petitioner was declared as successful bidder and Letter of Intent (LoI) was issued to the Petitioner on 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 2oo3 Act on 31.7.2008.

5. 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 6.405 MMTPA of coal for a period of 20 years with Mahanadi Coalfields Ltd, a subsidiary of Coal India 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 exercised its option to accept 20% of annual contracted quantity through import.

6. 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, Adani Global Pte Ltd which had acquired mining rights in the Bunyu mines in Indonesia. On 14.12.2009, a Coal Supply Agreement (CSA) was executed between Adani Global Pte Ltd and PT Dua Samudera Perkasa for supply of 10 MMTPA of coal at CIF price of USD30-35/MT depending upon GCV of coal to meet the Petitioner's requirements.

7. 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 MMTPA of coal at CIF price of USD 36/MT for a period of 15 years from the scheduled commercial operation date of last unit of Phase-IV of the project.

8. 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.

9. After promulgation of Indonesian Regulations, Adani Enterprise Ltd wrote 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. PT Dua Samudera Perkasa in its letter dated 20.9.2011 addressed to Adani Global Pte Ltd conveyed that as coal supply other than the Harga Batubara Acuan (HBA) prices would be considered as violation of Indonesian Regulations resulting in suspension of license, suitable amendment in the price arrangement was required. In view of the promulgation of the Indonesian Regulations having an impact on the export price of coal from Indonesia and on the commercial viability of the Mundra Power Project, the Petitioner approached this Commission for seeking relief for mitigation of the hardship on account of promulgation of the Indonesian Regulations. The Petitioner made the following prayers in the petition:

"(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."

10. The respondents, namely GUVNL and Haryana Utilities, raised the issue of jurisdiction of this Commission to deal with the dispute between the Petitioner and Respondents under Section 79(1)(f) read with Section 79(1)(b) of the 2003 Act. The Commission in the order dated 16.10.2012 held that the Petitioner had a composite scheme for generation and supply of power from Mundra Power Project to more than one State. Haryana Utilities filed Review Petition No.26/2012 seeking review of the order dated 16.10.2012 which was rejected by the Commission vide order dated 16.1.2013.

11. The Commission after hearing the Petitioner and the Respondents came to the following conclusions in the order dated 2.4.2013:

(a) 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. 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 appeared to have been wiped out, after the coal sales were required to be aligned with international benchmark prices of coal. With regard to the domestic coal, the Commission came to the conclusion that availability of coal from CIL was posing a challenge as CIL had 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.

(b) Indonesian Regulations do not constitute "force majeure" and "change in law" in terms of the PPAs with GUVNL and Haryana Utilities. Non-availability of full coal linkage from CIL or its subsidiaries cannot be considered as a force majeure event. Further, 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".

(c) The Commission in discharge of its statutory functions under Section 79 of the 2003 Act can 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 and unexpected increase in price of imported coal on account of Indonesian Regulations and short supply of domestic coal.

(d) The Commission decided to grant of relief in the form of compensatory tariff over and above the tariff agreed in the PPAs which would 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.

12. In order to compute the relief/compensation to be granted to the Petitioner, the Commission constituted an Expert Committee comprising two independent members, representatives of the Petitioner and the procurer States/distribution companies. On 16.8.2013, the Expert Committee submitted its recommendations to the Commission. After considering the suggestions and objections of the parties to the recommendations of the Expert Committee and the submissions made during the hearing, the Commission issued the order dated 21.2.2014 quantifying the compensatory tariff admissible to the Petitioner along with the mechanism for its recovery from the Procurers and a review after three years.

13. The orders dated 15.10.2012, 2.4.2013 and 21.2.2014 in Petition No.155/MP/2012 were challenged by UHBVNL & DHBVNL in Appeal Nos. 100 of 2013 and 98 of 2014, by GUVNL in Appeal No.116 of 2014, by Energy Watchdog &Another in Appeal No.125 of 2014, and by Prayas Energy Group in Appeal No.134 of 2014. After filing of the Appeal Nos.98 of 2014 and Appeal No.116 of 2014, the Petitioner filed cross objections bearing DFR No.1077 of 2014 in Appeal No.100 of 2013 challenging the order dated 2.4.2013 to the extent the pleas of force majeure and change in law made by the Petitioner were declined by this Commission. The Appellate Tribunal vide order dated 1.8.2014 dismissed the cross objections as non-maintainable. Thereafter, the Petitioner filed an appeal before Appellate Tribunal being DFR No.2355 of 2014 challenging the order dated 2.4.2013 to the extent that its claim of force majeure and change in law were declined by this Commission in the said order. The Appellate Tribunal dismissed the appeal on the ground of delay. Being aggrieved by the said order, the Petitioner filed Civil Appeal No.10016 of 2014 before the Hon'ble Supreme Court which was disposed of by vide order dated 31.3.2015 with the observation that "so long as Adani Power does not seek declaration of frustration of contracts resulting in relieving it from its obligations arising out of the contracts, it is entitled to argue any proposition of law, be it force majeure or change in law, in support of order dated 2.4.2013 quantifying

the compensatory tariff, the correctness of which has been challenged before the Appellate Tribunal in Appeal No.98 of 2014 and Appeal No.116 of 2014".

14. The Appellate Tribunal in the Full Bench judgement dated 7.4.2016 allowed the appeals filed against the Commission's orders dated 15.10.2012, 2.4.2013 and 21.2.2014 with the following observations/directions:

(a) The supply of power to more than one State from the same generating station of a generating company, ipso facto, qualifies as 'Composite Scheme' to attract the jurisdiction of the Central Commission under Section 79 of the said Act. The Petitioner has a 'Composite Scheme' for generation and sale of electricity in more than one State by a generating station of a generating company within the meaning of Section 79(1)(b) of the 2003 Act for the Central Commission to exercise jurisdiction.

(b) Change in Law provided under Article 13 of the PPAs or under Clause 4.7 of the said Guidelines issued by the Central Government as per Section 63 of the 2003 Act should not be construed to include laws other than Indian Laws, such as the

Indonesian Law/Regulations prescribing the benchmark price for export of coal from Indonesia.

(c) The increase in price of coal on account of the intervention of the Indonesian Regulation as also the non-availability/short supply of domestic coal in case of the Petitioner constitute a Force Majeure Event in terms of the PPA.

15. The Appellate Tribunal set aside the orders dated 2.4.2013 and 21.2.2014 and remanded the matter to the Commission to assess the impact of Force Majeure Event on the Mundra Power Project of the Petitioner and give such relief as may be admissible under the respective PPAs and in the light of the judgement after hearing the parties. Relevant excerpts of the Full Bench Judgement dated 7.4.2016 are extracted as under:

> "306. In the view that we have taken, Interim Order dated 2/4/2013 passed in Petition No.155/MP/2012, which is impugned in Appeal No.100 of 2013 and Interim Order dated 15/4/2013 passed in Petition No.159/MP/2012, which is impugned in Appeal No.151 of 2013 are set aside. Appeal No.100 of 2013 and Appeal No.151 of 2013 are, therefore, allowed. In view of answer to Issue No.5 above, we set aside the Final Order dated 21/2/2014 in Petition No.155/MP/2012 and Final Order dated 21/2/2014 in Petition No.159/MP/2012 granting compensatory tariff to Adani Power and CGPL respectively. Appeal No.125 of 2014, Appeal No.134 of 2014, Appeal No.98 of 2014, Appeal No.116 of 2014, Appeal No.124 of 2014, Appeal No.133 of 2014, Appeal No.97 of 2014, Appeal No.91 of 2014, Appeal No.100 of 2014, Appeal No.139 of 2014 and Appeal No.115 of 2014 are thus allowed.
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> 307. We remand Petition No.155/MP/2012 filed by Adani Power and Petition No.159/MP/2012 filed by CGPL to the Central Commission and direct the Central Commission to assess the extent of impact of Force Majeure Event on the projects of Adani Power and CGPL and give them such relief as may be

available to them under their respective PPAs and in the light of this judgment after hearing the parties. The entire exercise should be done as expeditiously as possible and at any rate within a period of three months from today."

16. The Appellate Tribunal settled the issue of composite scheme and the jurisdiction of the Central Commission over the Mundra Power Project of the Petitioner under Section 79(1)(b) and (f) of the 2003 Act. Further, the Appellate Tribunal upheld the decision of this Commission that the promulgation of Indonesian Regulations did not constitute Change in Law under the provisions of the PPAs. The Appellate Tribunal held that "the increase in price of coal on account of the intervention by the Indonesian Regulations as also the non-availability/short supply of domestic coal in case of Adani Power constitute a Force Majeure Event in terms of the PPA." The Appellate Tribunal remanded the matter and directed this Commission to assess the extent of impact of Force Majeure Event on the Mundra Power Project of the Petitioner and give such relief as may be available under the respective PPAs and in the light of the Full Bench Judgment after hearing the parties.

Proceedings before the Commission after remand

17. Consequent to the remand, the matter was listed for hearing on 26.4.2016. The Commission directed the Petitioner to file its submissions detailing the impact of force majeure and the proposed relief to be given in terms of the PPAs and Full Bench Judgement. The Respondents and

Prayas were directed to file their responses and the Petitioner to file its rejoinder(s), if any, to the responses. In compliance with the directions of the Commission, the Petitioner has filed its written submissions on 11.5.2016 delineating the extent of impact of force majeure event on Mundra Power Project of the Petitioner and the proposed methodology for granting relief in case of Gujarat PPA and Haryana PPAs and prayed for approval of the methodologies for grant of relief to the Petitioner to give effect to the judgement of the Appellate Tribunal. GUVNL, HPPC and Prayas have filed their replies and the Petitioner has filed its rejoinders. Subsequently, the matter was heard at length with the participation of all parties. The Commission vide its Record of Proceedings dated 15.7.2016 and corrigendum thereto directed the Petitioner to clarify certain queries and submit certain information/documents related to the relief sought by the Petitioner. The Petitioner vide its affidavit dated 4.8.2016 has submitted the required information except information on Column 10 and 14 of Format II and the information relating to proof of remittances to the mining companies and copy of the invoices raised by the mining companies on the ground that the said information/documents were not in its possession and would be directly submitted by the coal supply company, namely, Adani Global Pte Limited (AGPTE) to the Commission. Subsequently, AGPTE submitted the said information under letter dated 3.8.2016 (received on

8.8.2016) which contained the Coal Supply Agreement dated 14.12.2009 between AGPTE and PT Dua Samudera Perkasa, the details under columns 6, 10 and 14 of Annexure II (i.e. vessel name, FoB price of coal supplied as per the invoice of the mining company, and payment made to the mining company by the coal company), and copies of invoices and proof of remittances in respect of 19 vessels. AGPTE further submitted in the said letter as under:

> "It is submitted that the details being submitted herewith contain commercially sensitive information which is shared only for the Hon'ble Commission's consideration and not being made available to procurers. The same may not be disclosed or made available to any party as they contain commercially sensitive information. It is further requested that even in case where request is made by third party under the Right to Information Act, 2005 or under any regulations of CERC, the same shall not be shared with any individual or Government bodies."

The Petitioner vide its affidavit dated 23.8.2016 submitted that "the information and/or the documents provided by AGPTE may be considered as a part of the submissions made by the Petitioner".

18. The Commission held a hearing on 15.9.2016in order to consider the request of the Petitioner to maintain confidentiality in respect of the document. The Commission in its order dated 6.10.2016 directed as under:

> "15. .....AGPTE has submitted that the above documents/details contain commercially sensitive information which should not be shared with any person or Government Agency. AGPTE has further submitted that the respondents may be allowed inspection of these documents/details/records in the presence of the authorised representative of M/s Adani Power Limited and on an undertaking given by them to the Commission that they shall not part

with and/or disclose the information so made available to any other person or agency and shall use the same only for the purpose of this matter. The Commission has considered the documents in respect of which confidentiality has been claimed by AGPTE and is of the view that these documents cannot be treated as confidential or privileged in terms of Regulation 66 and 109 of Conduct of Business Regulations. Moreover, in an adjudicatory proceeding, the parties have the right to get the copies of the documents which have been sought by the Commission and make their submissions thereon. Since, AGPTE which is the owner of these documents has agreed to share these documents with the respondents with certain conditions, the Petitioner may approach AGPTE to waive the conditions before these documents are shared with the respondents. Accordingly, we direct the Petitioner to confirm by 10.10.2016 that the documents filed by AGPTE can be shared with the respondents to the petition without any condition."

19. The Petitioner vide its affidavit dated 10.10.2016 submitted that AGPTE with a view to facilitate the Commission to decide the matter expeditiously and considering the gravity involved, agreed to share the documents with the Respondents to the petition without any condition. Accordingly, the Petitioner confirmed that the documents filed by AGPTE can be shared with the Respondents without any condition and prayed that the matter be decided by treating the said documents as part of documents submitted by the Petitioner. Accordingly, the Registry of the Commission shared the documents filed by AGPTE with GUVNL, Haryana Utilities and Prayas. GUVNL and Prayas have filed their responses to the documents filed by AGPTE which has been dealt with elsewhere in this order.

Submissions of the Petitioner in its written submission dated 11.5.2016

20. The Petitioner in its written submission dated 11.5.2016 has submitted as under:

(a) The Appellate Tribunal in the Full Bench Judgement dated 7.4.2016 has observed that the increase in price of coal on account of the intervention by the Indonesian Regulation as also the non-availability/short supply of domestic coal in case of Adani Power constitute a Force Majeure Event in terms of the PPA. As a result, the Petitioner had to pay very high cost for coal as compared to what it was prior to the Force Majeure events which has impacted the economy and viability of the Petitioner making the fulfilment of their contractual obligations commercially impracticable.

(b) In case of PPA dated 2.2.2007 with GUVNL, the long term CSA for supply of coal was directly impacted by the Indonesian Regulations with effect from 24.9.2011 as the said CSA provides for supply of coal from Indonesia @ USD 36 PMT CIF (25.7 USD of FoB and 10.3 USD of Ocean Freight) for coal of 5200 GCV and other specifications set out therein. However due to enactment of Indonesian Regulations, the Petitioner is forced to procure coal at the benchmark prices FOB notified by Government of Indonesia on

monthly basis (HBA prices) which has been higher than the agreed price in the agreement.

(c) In case of Haryana PPA, 70% of contracted capacity of Haryana PPA is based on domestic coal supplies by CIL and balance 30% contracted capacity is based on imported coal to be procured from Indonesia. The imported coal was to be procured at USD 36 per MT CIF (25.7 USD of FOB and 10.3 USD of Ocean Freight) for 5200 GCV under aforesaid long term coal supply agreement. Though under the NCDP dated 18.10.2007 issued by Ministry of Coal assured supply of coal to the extent of 100% of normative requirement to all generating companies including Independent Power Producers (IPP) and accordingly, FSAs were executed with MCL for supply of coal at Notified Prices. Due to acute shortage in availability of domestic coal, Coal India Ltd. has been unable to meet the commitments made to the generating companies under NCDP. Such shortage/non-availability of domestic coal supply from CIL led to additional reliance on costly alternate coal i.e. imported coal. Thus the cost of coal has increased for Haryana PPA on account of Force Majeure events i.e. shortage of domestic coal and increase in imported coal prices due to introduction of Indonesian Regulation.

(d) As per the decision of the Appellate Tribunal, the Petitioner is entitled to get relief only to the consequential additional costs incurred pursuant to Force Majeure event which include the incremental FOB costs for the Indonesian coal i.e. difference between the FOB cost applicable post Indonesian Regulation and the FOB cost applicable as per FSA, cost of alternate coal (imported coal) used for meeting the shortfall in domestic coal supply (applicable only for Haryana PPA) and the other associated costs incurred for sustaining the operations from date of occurrence of force majeure event.

(e) Though there was no reference in the Judgment dated 7.4.2016 for adjustment of mining profit, the Petitioner as a goodwill gesture and as a fair and prudent entity has proposed that increase in mining profit of the Bunyu mine owned by AEL in Indonesia pursuant to Indonesian Regulation be adjusted from the relief.

(f) All such consequential costs net of incremental benefit from the mines be given as a relief in order to ensure that the Petitioner is brought back to the same economic equilibrium as if such events have not occurred.

21. In respect of the PPA dated 2.2.2007 with GUVNL, the Petitioner has submitted the following methodology with illustrative computation based on actual for the month of March 2016for assessment of Incremental coal cost due to Force Majeure event:

Parameters	Unit	Formula	Mar-16
Fuel Supply arrangement prior to Force Majeure			
Contracted GCV	Kcal/Kg	A	5200
Contractual FOB	USD/MT	B	25.70
Contracted Cost per 1000 Kcal	USD/1000 kCal	C = B / A	0.0049
Fuel Supply arrangement post to Force Majeure			
Actual GCV	Kcal/Kg	D	4575
Actual FOB	USD/MT	E	34.19
Actual Cost per 1000 Kcal	USD/1000 kCal	F = E / D	0.0075
Incremental Cost due to Force Majeure			
Incremental Cost per 1000 Kcal	USD/1000 kCal	G = F - C	0.0025
Net Heat Rate (Lower of Actual or CERC)	Kcal / kwh	H	2450
Actual Exchange Rate	₹ / USD	I	67.02
Energy Scheduled	Mus	J	556
Incremental Cost due to Force Majeure			
Total ₹ Crore	₹ Cr	K = (G*H* I / 1000)* (J /10)	22.81
Less: Profit from Bunyu Mine (As illustrated in 10 (a) (ii)	₹ Cr	L	0.20
Net Impact	₹ Cr	M = K – L	22.61

22. As regards the assessment of incremental benefit of Mining Profit, the Petitioner has submitted that the Petitioner originally planned to source the imported coal from its own mine i.e. Bunyu mine in Indonesia. However, on discovery of the fact that the coal supplies from Bunyu mine is not suitable for use at Mundra Power Project due to poor quality, AEL (the holding company of the Petitioner) tied up the coal supplies from other coal mining company, namely, PT Dua Samudera for supply

of 5200 Kcal/Kg coal. The Petitioner has submitted that the quality of Bunyu mine is 3000 Kcal/Kg and it produces around 3.5 to 5.0 MTPA. Bunyu coal is now being used for blending purpose only at Mundra TPS. For the purpose of adjusting additional mine profit from relief for Force Majeure, the Petitioner has suggested to work out additional profit of Bunyu mine for actual coal being used at Mundra Project at additional FOB earning worked out as difference of current HBA/Market price for Bunyu and FOB price of AEL contract (i.e. 25.7 USD/MT for 5200 Kcal/Kg) duly adjusted for Bunyu quality. The Petitioner has submitted that there are various Indonesian Government taxes and levies applicable till mining profit of Indonesian coal is repatriated to India. Accordingly, the Petitioner has proposed that the additional profit of Bunyu mine, net of such taxes and levies, be adjusted from relief of Force Majeure on account of increase in coal prices due to Indonesian Regulations. The Petitioner has given the following formula for adjustment of profit from the coal mine:

Parameters	Unit	Formula	Mar-16
Consumption of Bunyu for Bid 02 PPA	MT	A	0.11
Contractual FOB price, adjusted for Bunyu quality	USD/MT	B = 25.7 *3000 / 5200	14.83
Parameters	**Unit**	**Formula**	**Mar-16**
Actual price of Bunyu post Indonesian Regulation	USD/MT	C	15.40
Incremental Profit of Bunyu Mine due to Indonesian Regulation	USD/MT	D = C - B	0.57
	MUSD	E = D * A	0.063
% Taxes & Duties payable till repatriation of incremental	%	F	52.38%

Indonesian coal mine profit to India*			
Actual Exchange Rate	₹ /USD	G	67.02
Net Profit of Bunyu Mine to be adjusted from Relief of Force Majeure**	₹ Cr	H = [E *(1-F) *G]/10	0.20

* Rate of tax shall be as applicable from time to time.

** In case of Incremental Profit being negative, the amount proposed to be adjusted is NIL in the particular month and will be carried forward for adjustment.

23. In respect of the PPA dated 7.8.2008 with Haryana Utilities, the Petitioner has submitted a proposed methodology along with illustrative computation based on actuals for the month of March 2016. The Petitioner has submitted that the energy charges under Haryana PPA are based on 70:30 ratio of contracted capacity based on domestic coal and imported coal respectively. The Petitioner has submitted that the methodology for working out the relief towards the impact of Indonesian Regulations for the 30% of Contracted Capacity based on imported coal shall be on the same lines as proposed in case of Gujarat PPA, along with adjustment of incremental benefit of Indonesian coal mine profit. In respect of domestic coal, the Petitioner has Fuel Supply Agreement with Mahanadi Coalfields Ltd. (MCL) for supply of Annual Contracted Quantity (ACQ) of 6.41 MTPA of Domestic Coal for 1386 MW (70% of gross capacity of Units 7,8 and 9 i.e. 1980 MW). The capacity contracted under the PPA with Haryana Utilities is 1424 MW at the periphery of Haryana State. The ACQ corresponding to 70% of 1424 MW of

Contracted Capacity is 5.13 MTPA has been worked out by the Petitioner as under:

Gross Capacity based on linkage (MW) (70% of 1980 MW)	A	1386
Aux Consumption (%)	B	6.5%
Transmission Loss (%)	C	4%
Net Capacity at Haryana Periphery (MW)	D = A * (1-B)*(1-C)	1244
MCL ACQ (MTPA)	E	6.41
Contracted Capacity of Haryana Discoms based on coal linkage (70% of 1424 MW)	F=1424*70%	996.8
MCL ACQ for Haryana PPA (MTPA)	G=E*F/D	5.13

24. The Petitioner has submitted that to work out the shortfall of domestic coal, coal supplied by MCL will be allocated against Haryana PPA, in accordance with affidavit dated 8.5.2015 filed by the Petitioner before Appellate Tribunal. For shortfall in supply of domestic coal, if any, incremental energy charges (including transmission charges) using actual landed cost of alternate fuel shall be payable. The Petitioner has further submitted that the entire Scheduled Energy above the normative availability will be based on imported/ alternate coal supplies and will be paid accordingly. The Petitioner has made the assessment of incremental coal cost due to Force Majeure Event as under:

Parameters	Unit	Formula	March, 2016
Scheduled Energy	MUs	A	885
Scheduled Energy from Imported coal (30%)	MUs	B = A * 30%	266
Scheduled Energy from Domestic Coal (70%)	MUs	C = A * 70%	620
Impact of Indonesian Regulation (30% of the Contracted Capacity)			
Fuel Supply arrangement prior to Force Majeure			
Contracted GCV	Kcal/Kg	D	5200

Contractual Cost	USD/MT	E	25.70
Contracted Cost per 1000 Kcal	USD/1000 kCal	F = E / D	0.0049
Fuel Supply arrangement post to Force Majeure			
Actual GCV	Kcal/Kg	G	4595
Parameters	**Unit**	**Formula**	**March, 2016**
Actual FOB cost	USD/MT	H	34.53
Actual Cost per 1000 Kcal	USD/1000 kCal	I = H / G	0.0075
Incremental Cost due to Force Majeure			
Incremental Cost per 1000 Kcal	USD/1000 kCal	J = I – F	0.0026
Transmission Losses	%	K	4.33%
Net Heat Rate (Lower of Actual or CERC) grossed up with Transmission Loss	kCal/ kWh	L	2614
Actual Exchange Rate	₹/ USD	M	67.02
Incremental Cost per 1000 Kcal	₹/ 1000 kCal	N = J * M	0.1723
Total Impact due to Indonesian coal regulation (only for 30%)	₹ Crs	O = (N * L / 1000) * (B / 10)	11.96
Impact of Domestic Coal Shortfall (70% of the Capacity)			
ACQ for 1386 MW	MT	P	0.598
Capacity corresponding to 70% at Haryana Periphery	MW	Q	996.80

Auxiliary Loss	%	R	6.76%
ACQ corresponding to Haryana PPA	MT	S	0.479
Actual Receipt*	MT	T	0.479
% Domestic coal available	%	U	100%
Actual Shortfall in Domestic Coal	%	V	0%
Shortfall Energy to be Considered	Kwh	W = C * V	NIL
Landed Cost of Imported Coal	₹/MT	X	3440
GCV of Imported coal	Kcal/Kwh	Y = G	4595
Per Unit Cost	₹/Kwh	Z = (X / Y) * (L / 1000)	1.96
Transmission Charges	₹/Kwh	AA	0.36
Per Unit Cost including Transmission Charges and Losses	₹/Kwh	AB	2.32
Quoted Tariff	₹/Kwh	AC	2.181
Total Impact due to Shortage of Domestic Coal (only for 70%)	₹ Cr	AD = [(AB - AC) * W]	NIL
Total Impact	₹ Cr	AE = [O + AD]	11.96

Less: Profit from Bunyu Mine (As illustrated in 10 (b) (ii)	₹ Cr	AF	0.32
Net Impact	₹ Cr	AG = AE – AF	11.64

* Actual supply is capped at ACQ required for Haryana PPA.

25. The Petitioner has submitted the following for assessment of incremental benefit of mining profit due to Force Majeure Event:

Parameters	Unit	Formula	March, 2016
Consumption of Bunyu in U 7, 8 & 9	MT	A	0.18
Contractual FOB price, adjusted for Bunyu quality	USD/MT	B = 25.7 * 3000 / 5200	14.83
Actual price of Bunyu post Indonesian Regulation	USD/MT	C	15.4
Incremental Profit of Bunyu Mine due to Indonesian Regulation	USD/MT	D = C - B	0.57
	MUSD	E = D * A	0.10
% Taxes & Duties payable till repatriation of incremental Indonesian coal mine profit to India*	%	F	52.38%
Actual Exchange Rate	₹ / USD	G	67.02
Net Profit of Bunyu Mine to be adjusted from Relief of Force Majeure**	₹ Cr	H = [E * (1-F) * G] / 10	0.32

* Rate of tax applicable as stipulated in CERC order dated 21st February 2014, subject to adjustment as per change in rate of taxes from time to time.

** In case of Incremental Profit being negative, the amount proposed to be adjusted is NIL in the particular month and will be carried forward for adjustment."

26. The Petitioner has prayed that in terms of the judgement of the Appellate Tribunal dated 7.4.2016, relief may be granted and effected from the date of impact of the Force Majeure event with other associated costs in order to ensure that the Petitioner is brought back to the same economic equilibrium as if such events have not occurred.

Reply of Prayas Energy Group

27. Prayas in response to the written submission of the Petitioner has submitted as under:

(a) In terms of the Full Bench Judgement dated 7.4.2016, Indonesian Regulations has been held to be a force majeure event, and therefore, the reliefs to be considered are only those as provided in the PPA dated 2.2.2007 with GUVNL and PPAs dated 7.8.2008 with Haryana Utilities. According to Prayas, the written submissions filed by Adani Power do not refer to any provision of the PPAs under which the relief has been sought and therefore, no relief is admissible to the Petitioner as per the claims in the written submissions.

(b) Prayas has further submitted that in the written submissions, the Petitioner has based its claim for additional cost to be allowed on account of the impact of the Indonesian Regulations in a general manner, independent of the provisions of the relevant PPA which is against the judgement of the Appellate Tribunal in which it has been decided that "the generators would, therefore, be entitled to relief only as available under the PPA." Therefore, the Petitioner is not entitled to proceed on the basis that any consequential

additional cost incurred is to be allowed without confining to the provisions contained in the PPA.

(c) In terms of the PPA dated 2.2.2007 with GUVNL and the PPAs dated 7.8.2008 with the Haryana Utilities, the relief available on the existence of Force Majeure Event is provided in Article 12.7 of the respective PPAs. In terms of Article 12.7(a) and (b), there cannot be any relief on termination or suspension of the PPA as such a relief had been expressly barred by the Hon'ble Supreme Court in the order dated 31.3.2014 passed in Civil Appeal No 10016 of 2014. The Petitioner cannot, therefore, terminate or suspend the PPA or otherwise stop generating and supply electricity to the Procurers.

(d) The relief available under Article 12.7 is restricted to consequences of direct and Indirect Non Natural Force Majeure Events and further at the maximum available to debt service obligations, and no other tariff elements. The Petitioner has neither pleaded nor produced any material which gives any indication, much less any justification that debt service obligation of Adani Power was not fulfilled or was affected or it was a consequence of events and conditions contained in Article 12.7(c) to (g) of the PPA.

(e) The Petitioner has proceeded to base the computation on four factors, namely (i) Contracted GCV under Fuel Supply Agreement (FSA); (ii) Contracted Price under FSA; (iii) Actual GCV; and (iv) HBA Index Price. Further, the Petitioner has proceeded to consider certain parameters such as Station Heat Rate (SHR) at a norm different from bid assumed parameters. The Petitioner has to identify the specific FSA under which it has sourced coal from Indonesia from time to time and the terms and conditions of the said FSA to establish the binding legal and enforceable right of Adani Power/Adani Enterprises Limited/Adani Global PTE to source coal at a discounted price. The Petitioner also needs to support its claims based on underlying invoices with clear identification of quantum and quality of coal supplied to Mundra Power Project, the GCV and other specifications and the price of coal.

(f) The CSA between the Petitioner and Mahanadi Coalfields Limited provides for the supply of domestic coal to the extent of 70% of unit capacity, namely, 70% of 1980 MW which is 1386 MW. The assured quantum is 80% of the 70% (1386 MW) = 1109 MW. The Petitioner vide affidavit dated 8.5.2015 before the Appellate Tribunal had admitted that linked capacity of 1386 MW and coal

availability is to be towards Haryana and does not dispute or refute the submissions made that Adani Power had coal availability to the extent of 80.64%. Therefore, in case of PPAs dated 7.8.2008 with Haryana Utilities there has hardly been any need to import coal from Indonesia and consequently any impact of promulgation of Indonesian Regulations.

(g) The Petitioner is required to justify its claim with reference to the relevant Coal Supply Agreements both for GUVNL and Haryana Utilities and with reference to the bid assumed parameters.

28. Prayas has submitted that the process to be adopted to consider the impact of Indonesian Regulations has to be based on the following:

(a) Identify the FSAs available to Adani Power at the time of bidding or soon thereafter providing for a right to source coal from Indonesia at a discounted price as compared to the market price prevalent. The claim on account of impact of Indonesian Regulations, if any, can be considered only to extent of the quantum available with discount under firm FSA. The remaining quantum of Indonesian coal was not available to Adani Power or Adani Enterprises at discounted price at or near the time of bidding

and is to be taken as being premised on market prices and variations. The remaining quantum cannot be considered to have been impacted by Indonesian Regulations.

(b) Determine on Year on Year basis the discounted price available as there are provisions in the FSA for escalation.

(c) In the case of Haryana, determine the quantum of domestic coal availability from Mahanadi Coalfields Limited under the FSA signed. This quantum cannot be considered to have been impacted by Indonesian Regulations. The balance quantum can only be considered for impact of Indonesian Regulations.

(d) Ascertain the HBA Index or international market prices of coal of the relevant GCV. The HBA Index gives the market price of coal on a month to month basis. Prayas has filed the HBA Index prices till April 2016.

(e) Determine the difference between the discounted price of coal available to Adani Power under the FSA and the actual price of Coal to be considered subject to the maximum of HBA Index Prices.

(f) Consider whether the quoted energy charges can absorb the above difference in the prices.

(g) The Petitioner is required to demonstrate that after accounting for normative operation and maintenance cost, there is any impact on its ability to service debt, which in turn is arising due to additional expenditure on fuel cost because of the Indonesian Regulations, and restrict the claim to the extent needed to service the debt. The impact on debt service will need to be established based on actual financial documents and loan agreements.

29. The Petitioner in the rejoinder has submitted as under:

(a) The Appellate Tribunal after considering the submissions and documents placed on record by the parties including Prayas has held that promulgation of Indonesian Regulations and non-availability/short supply of domestic coal are events of force majeure affecting Adani Power and therefore, the Petitioner is entitled for relief under the terms of the PPAs and in the light of the judgement dated 7.4.2016. Referring to observations of the Appellate Tribunal in paras 163 (Adjudicatory power of the Commission under the 2003 Act and PPA to grant relief), 231(Consolidated Coal Supply Agreement dated 26.7.2010 for

supply of 10 MMT of coal per annum at CIF USD 36/MT for a period of 15 years from the SCOD of last unit of Phase IV), 292 & 303 (increase in coal prices on account of Indonesian Regulations and non-supply/short supply of domestic coal constitute force majeure), and 300 (relief can be granted under the PPA as it falls under force majeure) of the judgement dated 7.4.2016, the Petitioner has submitted that said observations are binding and cannot be re-agitated before the Commission and therefore, the scope of the proceedings before the Commission is limited to granting relief for force majeure under Articles 12.7 and 17.3 of the PPAs read with Section 79(1)(f) of the 2003 Act as well as in the light of the Full Bench Judgement without going into the issues/submissions which have been considered in the Full Bench judgement.

(b) The Appellate Tribunal has recorded the submission of Prayas that "such determined tariff cannot be re-opened except as provided in the PPA, namely, by reason of Force Majeure or Change in Law" and therefore, Prayas is stopped from making any contrary submission i.e. there is no relief admissible to Adani Power. Further, the submissions made by Prayas in the reply were made in the Appeal No.134 of 2014 which have been disposed of

by the Full Bench judgement and the Clarification Application. An attempt was also made by Prayas to re-agitate the issue in the Clarification Application which was dismissed by the Appellate Tribunal vide order dated 1.5.2016. Therefore, Prayas cannot be allowed to re-agitate the same issues again.

(c) The relief proposed by the Petitioner in its submissions is the relief available under the PPA and in the light of the Full Bench judgement. Article 12.7(b) is an inclusive provision which entitles an affected party for the relief in case of force majeure. The provisions of Article 12.7(c) to (g) of the PPAs relates to a situation where force majeure events affect the availability of the power station and therefore, the relief contemplated under the said provisions are irrelevant to the adjudication of the present petition. The relief under Article 12.7 is not restricted to direct and indirect non-natural force majeure events and is not restricted to debt service obligations only and therefore, submissions of Prayas in this regard warrant rejection.

(d) Station Heat Rate at the time of bid was based on the basis of availability of particular GCV of coal with moisture at a particular level and subsequent events related to fuel which were not under control of the Petitioner, had altered the Station Heat Rate

considered at the time of the bid since using different quality of coal increases the SHR. In such circumstances, it is imperative to consider the actual operational parameters rather than operational parameters assumed at the time of the bid to assess the actual impact of Force Majeure. The Petitioner, however, has proposed to consider actual SHR subject to maximum of SHR provided by this Commission in Tariff Regulations issued from time to time.

(e) With response to the contention of Prayas regarding the Fuel Supply Agreement, it has been submitted as per the observations of the Appellate Tribunal, CSA dated 24.3.2008 and 15.4.2008 were consolidated by CSA dated 26.7.2010 according to which the Petitioner was entitled to procure coal of GCV 5200 kcal/kg at CIF rate of USD 36/MT which has been impacted by Indonesian Regulations. Therefore, the corresponding FOB price based on the CSA dated 26.7.2010 is required to be considered as base for the purpose of assessing the impact of Indonesian Regulations.

(f) In terms of the Petitioner's affidavit dated 8.5.2015 before Appellate Tribunal, the Petitioner will consider entire domestic coal received from Mahanadi Coalfield Limited under FSA dated 9.6.2012 towards power supplied to Haryana Utilities under PPAs

dated 7.8.2008 till the time Adani Power enters into long term PPA with regard to balance capacity or Government of India permits use of linkage coal towards supply on short term or medium term. The Petitioner has contended that it nowhere admitted domestic coal availability of 80.64% as contended by Prayas.

(g) As regards the contention of Prayas for backward calculation of landed cost of fuel from the quoted energy charge, the Petitioner has submitted that similar submissions were made by Prayas before the Appellate Tribunal in its written submissions and after considering all documents, the Appellate Tribunal has come to the conclusion that promulgation of Indonesian Regulations and short supply of domestic coal are force majeure events affecting the Petitioner and directed the Commission to grant such relief as available in the PPA and in the light of the Full Bench Judgement.

Reply of GUVNL

30. GUVNL has submitted that as per the PPA dated 2.2.2007 between the Petitioner and GUVNL, the relief available under the Force Majeure provisions of PPA is specified in Article 12.7 of the PPA. Since Mundra Power Project of the Petitioner was selected through Competitive Bidding process, GUVNL was not required to know the Bid

parameters viz. SHR, GCV of coal, Auxiliary consumption, FOB price of imported coal etc. based on which APL had premised their bid for supply of power. It is therefore necessary and important to know the extent to which the viability of Mundra Power Project has been affected on account of increase in coal price by Indonesian Government. GUVNL has requested the Commission to consider the following while granting the relief to the Petitioner:

(a) The base FOB price of imported coal as per FSA prior to enactment of Indonesian Regulation and incremental FoB cost thereon being incurred by the Petitioner post enactment of Indonesian regulation be ascertained.

(b) The Commission may carry out due diligence and undertake prudence check to ascertain the quantity of imported coal affected due to the increase in Indonesian coal price.

(c) The Commission may carry out prudence check about imported coal price considered by M/s APL i.e. 36 $/MT CIF for 5200 kcal/kg coal in order to ascertain the base FOB price against which increase in coal price is to be assessed since GUVNL is not having any document except the copy of FSA dated 24.3.2008 whereas the bid was submitted on 2.1.2007.

(d) The Petitioner in the calculations has considered FOB price of USD 25.70/MT for 5200 kcal/kg against the CIF price of USD 36/MT FOB price meaning thereby the transit cost and insurance is around USD 10.30/MT. The Commission may carry out due diligence and prudence check of the transit charges and insurance cost of around USD 10.30/MT.

(e) The Petitioner has submitted that the actual operation of the power plant is on coal having GCV 4575 Kcal/Kwh while the FSA dated 24.3.2008 stipulates the GCV of 5200 Kcal/Kwh and moreover, the Petitioner is stating that the Bunyu mine is not yielding good result and the coal has GCV of 3000 Kcal/Kwh. In view of the various GCVs mentioned by the Petitioner, the Commission may carry out due diligence and prudence check to ascertain the correctness of GCV and its implication on the cost of electricity.

(f) The Petitioner has considered net SHR of 2450 kcal/kwh (lower of actual or CERC norms). The Petitioner is claiming and receiving reimbursement of Clean Energy Cess from GUVNL based on GERC order dated 7.1.2013 on "Change in Law" wherein Gross SHR of 2299.75 kcal/kwh (2150.27 kcal/kwh with Auxiliary 6.5%) is taken / approved for calculating impact of Clean Energy

Cess. The Commission may consider the parameters approved by GERC while assessing the impact of force majeure in the order dated 7.1.2013.

(g) The Petitioner has considered base FoB of USD 14.83/MT for 3000 GCV of Bunyu coal (Pro-rata of base FoB of USD 25.70/MT for 5200 GCV coal) whereas for actual, the Petitioner has taken price of Bunyu as USD 15.40/MT for GCV of 3000 kcal/kwh which is not matching on pro-rata basis with actual coal of GCV 4575 kcal/kwh at USD 34.19/MT. If the base price of 3000 GCV coal is worked out by applying proportionate formula, the current price also has to be worked out by applying proportionate formula, otherwise actual price of 3000 GCV coal at the time of bidding (Base price) shall also be quite different than price calculated based on proportionate formula.

(h) The Petitioner has shown that coal consumption from Bunyu mines is only 0.11 MT during March, 2016 for supply of power to GUVNL. Moreover, the Petitioner has reduced profit of Bunyu mines in Indonesia saying that Bunyu mine is not suitable due to poor quality of coal and has been used for blending purpose only. The CSA dated 24.3.2008 between APL and AEL defines "Designated Mines" as the coal mines which are located in

Lamindo, Mitra, and Tambang Bunyu Island, in East Kalimantan, Indonesia in which the supplier subsidiary Pt Adani has mining rights.

(i) All the coal mined and sold from the APL group companies' mines should be considered for transferring of increase in revenue to GUVNL due to Indonesian Regulations. The power company of APL is affected by viability due to increase in price of coal while APL group companies' mines revenue has been increasing to the same extent. The increase in revenue from APL group companies' mines should be taken into account for reducing the implication of Force Majeure as not only increase in cost but increase in revenue also have to be passed on due to consequence of Force Majeure. Moreover, the indicated tax and Duty rate of 52.38% in the calculation at 11 (a) (ii) may be verified by the Commission.

31. The Petitioner in its rejoinder has submitted as under:

(a) The relief sought by the Petitioner is in terms of the PPA dated 2.2.2007 and in the light of the Full bench judgment. Article 12.7 is the foundation for granting relief on account of Force Majeure events. Article 12.7(b) is an inclusive clause which encompasses any/all other reliefs/remedies available to a party which, in the facts of the case, would remove the hardship caused

to a party to perform its obligations under the PPA. As observed in the Full Bench Judgment, the Petitioner continued to supply electricity and fulfilled its obligations all throughout despite being affected by Force Majeure event and therefore, as per Article 12.7(b), the Petitioner is entitled for the relief of Force Majeure with regard to its continual obligations of supplying power.

(b) The Consolidated Coal Supply Agreement dated 26.7.2010 was executed between Adani Power and Adani Enterprises Limited which entitled Adani Power to procure coal at CIF price of USD 36 per MT for GCV 5200 kcal/kg of coal. Since, the Appellate Tribunal has observed that the Petitioner was procuring coal at CIF price as per the CSA dated 26.7.2010, therefore CIF price at which the Petitioner was procuring coal prior to the Indonesian Regulations cannot be questioned in the present proceedings. The Petitioner has considered the ocean freight charge of USD 10.3 USD/MT (inclusive of 3% of insurance, finance and transaction charge on 10USD/MT of freight) in the present submission in line with the Petitioner's submission dated 21.11.2013 before this Commission in regard to bid assumptions. Balance portion of USD 36/MT CIF i.e. USD 25.7/MT is the base contracted FoB under the FSA.

(c) As regards the correctness of GCV and its implications on the cost of electricity, the Petitioner has submitted that Mundra Power Plant has been designed for coal GCV of 4500 kcal/kg and the Petitioner is using blend of high and low GCV coal in such a way that the GCV of blended coal remains within ± 5% of design GCV. As regards the quality of coal from Bunyu mines, the Petitioner has submitted the quality report and draught survey certificates of GCV of coal received from Bunyu mines which shows that GCVs of four vessels received during March 2016 were 3003, 2998, 3004 and 3025 kcal/kg respectively. The Petitioner has also submitted copy of the letter dated 24.1.2013 from the EPC Contractor SEPCO-III Electric Power Construction Corporation which certified that the 660 MW Boiler supplied by Habin Boiler Company Limited was designed based on the coal GCV of 4500 kcal/kg with variation of ± 5% of the design GCV. Further, the expected gross station heat rate and Auxiliary Power Consumption with minimum permitted GCV of 4275 kcal/kg have been certified as 2395 kcal/kg and 7.05% respectively. The Petitioner has submitted that it is using the blend of Low and High GCV coal in order to achieve GCV near designed GCV so as to achieve the least cost of the electricity generated.

(d) With regard to consideration of the Gross SHR of 2299.75 kcal/kg(2150.27 kcal/kg with Aux of 6%) in accordance with the order dated 7.1.2013 of GERC, the Petitioner has submitted that GERC considered SHR guaranteed by OEM which did not take into account issues such as availability of particular GCV of coal, moisture level, the margins etc. The Petitioner has submitted that using different quality of coal other than design GCV of 4000kcal/kg due to non-availability of ideal quality of coal increases the SHR. Therefore, it is imperative to consider the actual operational parameters rather than operational parameters assumed at the time of the bid to assess the actual impact of force majeure. The Petitioner, however, has proposed to consider actual SHR subject to maximum of SHR provided by this Commission in Tariff Regulations issued from time to time.

(e) As regards the increased revenue from sale of all coal mined from Adani group companies' mines due to Indonesian Regulations should be considered for reducing the implications of force majeure is erroneous since no other mine is being owned by any company of Adani Group in Indonesia. The Petitioner has submitted that there was no reference to the Judgment of the Appellate Tribunal for adjustment of mining profit and the Petitioner

as a goodwill gesture and a fair and prudent entity has proposed that increase in mining profit of the Bunyu mine towards the coal used for supplying electricity under PPA dated 2.2.2007, pursuant to the Indonesian Regulations be adjusted from the relief.

(f) The Petitioner has submitted that coal having actual GCV of 4575 kcal/kg considered for March, 2016is blending of coal of different GCVs and cannot be compared directly with GCV of Bunyu coal as is evident from the following table:

Particulars	Quantity (MT)	GCV (Kcal / Kg)	FOB (USD/MT MT)	HBP (USD/MT MT)	Lower of FOB and HBP HBP
Bunyu	131907	3007	15.40	13.98	13.98
Melawan	134282	5283	44.47	44.47	44.47
Canadian	11148	6445	56.51	56.51	56.51
Indonesian Steam Coal 58	77833	5742	47.51	47.51	47.51
Total	355170	4575	34.72	34.19	34.19

The Petitioner has submitted that price of coal received from Bunyu for GCV of 3007 kcal/kg is USD 15.40 per MT and the same is considered on actual basis for passing on the benefits of mining profit. However, the same is capped at Benchmark HBP (i.e. USD 13.98/ MT) of corresponding GCV while computing relief under force majeure. The Petitioner has further submitted that in order to maintain coal GCV near design GCV and economize the cost, the Petitioner is using blend of Low GCV coal of 3000 kcal/

kg and High GCV coal of 5200 – 6000 kcal/ kg.

(g) The Petitioner has executed consolidated FSA for 10 MMT for PPAs dated 2.2.2007, 6.2.2007 and 7.8.2008 which has been noted by the Appellate Tribunal in the Full Bench Judgment. Therefore, any profit after appropriation of taxes and duties is required to be considered in proportion of usage of coal under each of the PPAs. As regard to applicable taxes and duties of 52.38%, the Petitioner has considered based on applicable Indonesian statutes as follows:

Parameters	Formula	Amount	Remark
Profit from Indonesian Mines	A	100	
Royalty	B= A x 13.50%	13.50	No change
Revenue net of royalty	C = A - B	86.50	
Taxes and duties including Mandatory Retention in Indonesia	D = C x 45%	38.93	No change
Net Incremental Profit	E = C-D	47.62	
Taxes and duties as % of Profit	F = A - E	52.38	

The Petitioner has placed on record a certificate regarding the prevailing rates of Taxes/Duties and Royalty as Annexure –3 to the rejoinder. The Petitioner has submitted that it shall consider prevailing taxes and duties as amended from time to time while computing net incremental profit to be shared from Bunyu mines.

Submission of Haryana Utilities

32. Haryana Power Purchase Centre on behalf of Haryana Utilities has submitted that the Commission while deciding the relief may consider the improved efficiency parameters so that the impact on consumers of Haryana is minimized. HPPC has further submitted that the any relief may be granted after considering the following:

(a) Foreign Exchange Rate Variation should be with the generator and no compensation on account of FERV is admissible.

(b) The affidavit of the Petitioner dated 8.5.2015 filed before the Appellate Tribunal for Electricity be considered in which the Petitioner has admitted that the entire actual domestic coal received from MCL would be allocated towards the power supplied under the Haryana PPAs for the purpose of computation of compensatory tariff. Therefore, the actual coal received from MCL is required to be considered towards the power supplied under Haryana PPAs for the purpose of relief under force majeure.

(c) As regards the mode and manner for deciding the pricing of coal, it has been submitted that an affidavit should be filed by the Petitioner indicating that all efforts shall be made for opting the cheapest option to be substituted against shortfall of linkage of fuel,

if any. Without prejudice to this submission, HPPC has submitted that landed cost of imported or e-auction coal whichever is lower(on heat value basis) should be considered for the purpose of meeting shortfall in domestic coal, if any. In case of imported coal, the actual price shall be allowed subject to maximum ceiling of relevant HBA price or any other relevant indices of source country from which coal is imported. All efforts shall be made by the Petitioner to reduce the impact on procurers by substituting the less grade coal without compromising efficiency.

(d) The Petitioner shall furnish details of the quantum of domestic coal supplied under the FSA duly certified by CIL. In case of any shortfall only, compensation may be allowed subject to the affidavit of the Petitioner dated 8.5.2016 filed before the Appellate Tribunal.

(e) Actual profit of Indonesian mine on account of enactment of Indonesian Regulations need to be shared with respect to the imported coal consumed for Haryana Utilities. The Commission may also propose a methodology to adjust the same on account of enactment of Indonesian Regulations to avoid any ambiguity in the matter.

(f) Station Heat Rate shall be considered after ascertaining actual design heat rate and margin as per the CERC regulations from time to time.

(g) GCV of imported coal should be certified by third party Sampling Agency and CERC should provide guidelines for the same alongwith penalty for wrong declaration of GCV.

(h) The Commission may consider all possible action to reduce fuel cost including usage of low grade coal to the extent possible considering the technical limits in order to reduce the impact of force majeure on end consumers and issue clear directions to the Petitioner with approved formula for future calculations.

(i) The Commission may approve the amount of impact for past period alongwith the formula for the future period.

(j) The operational parameters as suggested above should not be inferior to those that may be decided for Gujarat.

33. The Petitioner in its rejoinder has submitted as under:

(a) As regards the foreign exchange rate variation, the Petitioner has submitted that the Petitioner had premised the bid with FOB price of USD 25.7/MT and the exchange rate considered at that time was ₹39.7 per USD as against the prevailing rate of ₹67.02

per USD. As per the methodology proposed by the Petitioner for grant of relief due to force majeure, the relief for increase in cost of coal due to promulgation of Indonesian Regulations is limited to the incremental FOB cost and the Petitioner has not sought the relief for FERV impact on contracted FOB price i.e. USD 25.7/MT. The Petitioner has submitted that even Haryana Utilities in their written submission dated 13.5.2015 filed before the Appellate Tribunal had submitted that FERV can be considered only for excess of the contracted price. With regard to alternate coal procured by the Petitioner, it has been submitted that relief shall be based on actual cost of alternate coal procured at the prevailing Exchange Rate, since such cost is a consequence of force majeure event, i.e. short supply of domestic coal.

(b) As regards the quantum of coal under linkage, the Petitioner has submitted that the proposed methodology is in consonance with the affidavit dated 8.5.2015 filed by the Petitioner before Appellate Tribunal in which it has been submitted that "the entire domestic coal received from MCL will be allocated towards the power supplied under Haryana PPAs for the purpose of computation of compensatory tariff in accordance with GOI guidelines".

(c) With regard to the contention of Haryana Utilities that landed cost of imported coal or e-auction coal whichever is lower on heat value basis should be procured for the purpose of meeting the shortfall of domestic coal, the Petitioner has submitted that apart from lowest cost in terms of per GCV basis, selection of alternate coal depends upon various other factors such as suitability to the design parameters, availability of corridor to transfer the coal, grade etc. Though analysis of the landed price of e-auction coal for the last four years and recent CIL Notification dated 29.5.2016 increasing the cost of coal supplied to power sector makes the e-auction coal a costlier option, the Petitioner has assured to endeavour to procure the cheapest coal in lieu of shortfall in domestic coal considering all relevant factors. With regard to the price of imported coal, the Petitioner has submitted that the methodology considers minimum of the relevant HBA price or any other relevant indices from the source country or actual price.

(d) With regard to the authentication of data relating to domestic coal, the Petitioner has submitted that it will approach CIL for certification of quantum of domestic coal supplied under the FSA dated 6.9.2012 and furnish the certificates for the financial years 2012-13 to 2015-16 once the methodology is decided by the

Commission and for the future, the Petitioner shall furnish the said certificate on annual basis on completion of the financial year.

(e) As regards the sharing of mine profit, the Petitioner has submitted that the Petitioner as a goodwill gesture has already proposed to adjust the actual profit of Indonesian mines in line with the proposal of the respondents. As regards the Station Heat Rate, the Petitioner has submitted that the contention of Haryana Utilities is in line with the methodology proposed by the Petitioner.

(f) As regards the GCV of imported coal, the Petitioner has agreed to provide all documents as may be directed by the Commission while granting relief to the Petitioner. As regards the usage of domestic coal, the Petitioner has submitted that it has been using low grade coal to the extent possible considering the techno-economic feasibility and shall continue to do the same taking into account all relevant factors like the quality and quantity of coal available and technical parameters of the boiler.

(g) As regards the submission of Haryana Utilities requesting the Commission to approve the amount of the impact of the past period alongwith formula for future, the Petitioner has submitted that the Commission may decide the modalities for recovery of

relief for the past period and methodology for the future recovery on monthly basis.

Submissions during the hearings

34. Learned Senior Counsel appearing for the Petitioner extensively dealt with the scope of the remand, relief available to the Petitioner in terms of the PPA and the Full Bench Judgement, and proposed methodology for quantification of relief.

(a) With regard to the scope of the remand, learned senior counsel submitted that the Appellate Tribunal in the Full Bench Judgement has held that the increase in prices of coal on account of intervention by the Indonesian Regulations as also the non-availability/short supply of domestic coal in case of Adani Power constitute force majeure in terms of the PPAs and has remanded the matter to the Commission to with a direction to assess the impact of Force Majeure Event on the project of Adani Power and grant such relief as may be admissible under the respective PPAs and in the light of the judgement. Learned Senior Counsel submitted that all issues have been adjudicated by the Appellate Tribunal except the quantification of the impact of force majeure and the parties cannot re-agitate the same issues directly or

indirectly before the Commission in a remand proceeding. Therefore, the scope of the present proceedings is limited to how much relief is required to be granted to the Petitioner in view of the Full Bench Judgement. Learned senior counsel submitted that PPAs are long term contracts and it is not possible to envisage all the risks over such a long period of contract. The intention behind including force majeure clause in the PPA is to save the performing party from the consequences of the force majeure. Learned Senior Counsel submitted that the Petitioner has been supplying electricity to the Procurers even after occurrence of force majeure on account of promulgation of Indonesian Regulation with a hope that force majeure clause in the PPA will address the situation which has also been noted by the Appellate Tribunal in the Full Bench judgment. Learned Senior Counsel submitted that Prayas in its written submission has submitted that no relief is admissible to the Petitioner for force majeure event. Learned Senior Counsel submitted that not providing any relief to the Petitioner would amount to nullifying the Full Bench Judgment since Appellate Tribunal after holding that promulgation of Indonesian Regulation and short supply/Non-availability of domestic coal are force majeure events remanded the matter to the Commission to only assess the impact and grant

relief to the Petitioner. Learned Senior Counsel submitted that if the context of the remand by Appellate Tribunal is not construed properly, and the end result of the remand is zero, it would result in nullity of the remand.

(b) With regard to the relief available to the Petitioner in terms of the PPA and the Full Bench judgement, Learned Senior Counsel for the Petitioner submitted that Articles 12, 13 and 17 of the PPAs contemplate price adjustment in certain given circumstances and therefore, moulding of tariff is inherent in the PPA. Any interpretation of the PPA that it does not provide for any relief for force majeure in facts and circumstances of the case amounts to nullifying the Full Bench Judgment dated 7.4.2016. If PPA did not provide for any relief, then the Appellate Tribunal would have simply observed the same in its judgment rather than remanding the matter to this Commission for assessing the impact and granting the relief in terms of the PPA and in light of the Full Bench Judgement. Learned Senior Counsel further submitted that submission of Prayas that the Appellate Tribunal did not examine or consider Article 12.7 (b) of the PPA while remanding the matter before this Commission, negates the observations of the Appellate Tribunal more particularly paras 283 and 293 of the Full Bench

Judgment. Referring to the submission of Prayas, Learned Senior Counsel submitted that Article 12.7 (c) to (f) are illustrative reliefs to be granted in certain circumstances and they do not control the main clause (Article 12.7). Learned Senior Counsel further submitted that force majeure cannot have exhaustive definition or exhaustive clause regarding the relief to be provided for force majeure as all events cannot be foreseen. Learned Senior Counsel submitted that grant of restitution is inherent while exercising adjudicatory powers. Unless prohibited by a higher court, any court can mould the relief for doing complete justice. Learned Senior Counsel further emphasized that PPAs are commercial contracts and principles of Section 70 of the Contract Act can be applied to grant the relief to an affected party. The procurers having received electricity are liable to pay/ restitute Petitioner to the extent the Petitioner has suffered due to Force Majeure Events.

(c) With regard to the computation of the impact of the force majeure, Learned Senior Counsel submitted that for grant of relief, the Commission needs to consider the price at which coal was available to the Petitioner prior to Indonesian Regulations and the price at which Petitioner is procuring coal after the Indonesian Regulations. Learned Senior Counsel referring to the computation

for the month of March 2016 submitted that each figure in the said statement is backed by either statutory Auditor's certificate or third party report. Learned Senior Counsel further submitted that the relevant CIF price prior to Indonesian Regulations was USD 36 per MT as per the CSA dated 26.7.2010 which translates into USD 25.7/MT after reducing ocean and fright charges for the same. Learned Senior Counsel clarified that USD 45/MT mentioned in the FSA dated 8.12.2006 corresponds to GCV of 6000/kcal/kg which is equivalent to the rate of USD 36 applicable to 5200 kcal/kg under the consolidated FSA of 26.7.2010. He further submitted that the Petitioner is not claiming the FERV on the base price of coal considered in the FSA. However, the Petitioner is claiming FERV on the difference between the prevailing price and the negotiated price since the same is the impact of the Indonesian Regulations. As regards the coal sourced from Mahanadi Coalfield Limited, Learned Senior Counsel submitted that linkage was granted to Adani Power for 70% of 1980 MW and not for capacity tied up with Haryana only. In the affidavit dated 8.5.2015 filed before the Appellate Tribunal, the Petitioner offered to consider domestic coal received upto 5.13 MMTPA towards supply of electricity to Haryana. Learned Senior Counsel submitted that pursuant to Force Majeure Event, the Petitioner is entitled to get relief to the

consequential additional costs which shall include (i) the incremental FOB costs for the Indonesian coal i.e. difference between the FOB cost applicable post Indonesian Regulation and the FOB applicable as per FSA, (ii) cost of alternate coal (imported coal) used for meeting the shortfall in domestic coal supply (applicable only for Haryana PPA), and (iii) the other associated carrying cost incurred for sustaining the operations from date of occurrence of force majeure event to the date of getting relief.

35. Learned Counsel for Prayas submitted that in the present proceeding, Prayas is not challenging that promulgation of Indonesian Regulation is not a Force Majeure Event in view of the judgment of the Appellate Tribunal. Learned Counsel submitted that the impact of force majeure needs to be considered only for cases where the Fuel Supply Agreement provides for discounted price. For this purpose, the Commission needs to go into the details of the Coal Supply Agreement and the supply of coal received and HBA index issued from time to time. Learned Counsel further submitted that in case of PPA dated 7.8.2008 with the Haryana Utilities there has already been any need to import coal from Indonesia and consequently an impact of the Indonesian Regulations for supply of electricity to Haryana Utilities. According to the Learned Counsel, the Petitioner has submitted that it is not claiming

relief under Article 12.7(c) to (g) and confining the relief under Article 12.7(b) which does not provide for variation in tariff. Further, relief under Article 12.7(c) to (g) is restricted to Debt Service Obligations or Capacity Charge only and therefore the generating companies cannot claim the bigger relief under Regulation 12.7(b). Learned Counsel requested the Commission to consider the computation done by Prayas in the case of the Petitioner. The Learned Counsel for Prayas submitted that if at all the relief can be granted under Article 12.7 (b) of the PPA it should be confined to the difference between the discounted price and HBA Index and with reference to the quoted energy charges. Accordingly, the relief should be confined to the quantum of coal to be imported from Indonesia which was subject to Indonesian Companies to supply coal at discounted price. Learned Counsel further submitted that since sale of electricity by the Petitioner to Haryana and GUVNL has been held to be a composite scheme, the same effect has to be given while computing the implication of Indonesian Regulation. Learned Counsel suggested that any surplus tariff available to the Petitioner in Haryana or in any of the PPA in GUVNL need to be offset against the losses on account of impact of Indonesian Regulations. Learned Counsel submitted that the underlying invoices month-wise computation given by the generator, details of the coal import done, GCV, FOB price etc. should be placed on record in a transparent manner.

36. Learned Counsel for Haryana Utilities submitted that the Petitioner is bound by its affidavit dated 8.5.2015 filed before the Appellate Tribunal regarding the use of domestic coal received under the FSA with Mahanadi Coalfield Ltd. Learned Counsel further submitted that the impact of FERV should be borne by the generator and no compensation on account of FERV is admissible. Further, actual profit from Indonesian mines on account of promulgation of Indonesian Regulation needs to be shared. Learned Counsel submitted that the operational parameters should not in any event be inferior to those decided for Gujarat. Learned Counsel submitted that Prayas' suggestion for adjusting the profit of one PPA against the other PPA is not acceptable and therefore, the benefit of Gujarat should not be adjusted against Haryana PPA.

37. Learned Counsel for GUVNL submitted that PPA is binding on the parties and therefore, relief should be given strictly in terms of Article 12.7 of the PPA. Learned Counsel submitted that SHR should be considered as 2299.75 (2150.27 kcal/kwh with Auxiliary consumption 6.5%) as approved by GERC. Learned Counsel submitted that the benefits by Adani group from all the mines owned by it in Indonesia due to promulgation of Indonesian Regulation should be adjusted in the relief being claimed by the Petitioner.

Analysis and Decision

38. The present petition has been taken up for consideration consequent to the setting aside of the orders dated 3.4.2013 and 21.2.2014 and remand of the matter to the Commission by the Appellate Tribunal to assess the impact of force majeure and grant relief in accordance with the provisions of the respective PPAs and in terms of the Full Bench judgement after hearing the parties. Accordingly, the petition was set down for hearing limited to the scope of the remand in which the Petitioner, procurers namely Haryana Utilities and GUVNL, and Consumer Group, namely, Prayas Energy Group participated. After hearing the submission of parties and the documents placed on record, the Commission has framed the following issues for consideration for grant of relief to the Petitioner in terms of the remand:

I. Scope of the remand;

II. The provisions of the PPAs and the observations in the Full Bench Judgement under which relief can be granted;

III. Coal Supply Agreements regarding imported coal;

IV. Coal Supply Agreement regarding domestic coal;

V. Adjustment of Profit from mines owned by the Petitioner or its Group Companies in Indonesia

VI. Invoices of coal imported from Indonesia

VII. Operational Parameters for working out the relief

VIII. Foreign Exchange Rate Variation

IX. Computation of relief for Force Majeure

X. Carrying Cost on the Relief allowed

I. SCOPE OF THE REMAND

39. The Appellate Tribunal in para 307 of the Full Bench Judgement has remanded the Petition No.155/MP/2012 to the Commission with the following directions:

> "307. We remand Petition No. 155/MP/2012 filed by Adani Power and Petition No. 159/MP/2012 filed by CGPL to the Central Commission and direct the Central Commission to assess the extent of impact of Force Majeure Event on the projects of Adani Power and CGPL and give them such relief as may be available to them under their respective PPAs and in the light of this judgment after hearing the parties. The entire exercise should be done as expeditiously as possible and at any rate within a period of three months from today."

40. All parties before us agree that it is a limited remand confined to assessment of the impact of force majeure event on account of the intervention of Indonesian Regulations and non-availability/short supply of domestic coal. However, the parties, particularly, the Petitioner and Prayas differ with respect to the scope of the remand. Prayas has clarified in its consolidated written submission dated 16.8.2016 that Prayas is not in any manner challenging the decision of the Appellate Tribunal on force majeure in the present proceedings. Prayas has

submitted that the Petitioner is seeking to expand the scope of the remand proceedings by taking pleas that in terms of the Full Bench Judgement, it is incumbent on the Commission to give monetary relief of restitution at all cost. According to Prayas, the Petitioner is proceeding on a fundamentally wrong basis that promulgation of Indonesian Regulations having been held as a force majeure event by the Appellate Tribunal, monetary relief is the sine qua non and there is no need to consider any other aspect and if no monetary relief is given to the Petitioner, the decision of the Appellate Tribunal would be rendered nugatory. The Petitioner on the other hand has submitted that the scope of remand proceedings before this Commission is limited to granting relief for force majeure under provisions of the PPAs qua Article 12.7 and Article 17.3 of the PPAs read with Section 79(1)(f) of the 2003 Act as well as the Full Bench judgement and there is no mandate to go into the issues and submissions which have been considered and decided in the Full Bench judgement. The Petitioner has further submitted that Article 12 of the PPA dealing with force majeure as interpreted by the Full Bench judgement is of widest amplitude. According to the Petitioner, Article 12.7(b) of the PPA is an inclusive clause which provides that an affected party is entitled to relief for force majeure event. Therefore, the Petitioner by drawing such inference from the provisions of the PPA in no way is trying to expand the scope of the remand proceedings as

alleged by Prayas. The Petitioner has submitted that the Appellate Tribunal has opined that the intention behind force majeure clause in the PPAs is to save the performing party from the consequences of force majeure event over which it has no control and therefore, the Petitioner who has fulfilled its obligations of supplying power to the Procurers in terms of the PPA is required to be granted relief as provided in the PPAs and in the light of the Full Bench judgement.

41. In view of the rival submissions of the parties, we have to first examine the scope of the directions of the Appellate Tribunal with regard to force majeure and relief for force majeure event. The Appellate Tribunal after holding that the Commission has no regulatory powers under Section 79(1)(b) of the Act to vary or modify the tariff or otherwise grant compensatory tariff to a generating company in case of a tariff determined through the tariff based competitive bid process under Section 63 of the 2003 Act, has dealt with the scope of the powers of the Commission to grant relief to the generators as under:

> "163…….. The adjudicatory powers available to the Appropriate Commission under Section 79(1)(f) of the said Act and Article 17.3 of the PPA can be used by the Appropriate Commission to give to the generator relief available under the PPA if a case of Force Majeure or Change in Law is made out under the PPA. …..If a case of Force Majeure or Change in Law is made out, relief provided under the PPA can be granted to the generators……"

42. The Appellate Tribunal proceeded to examine whether in the facts and circumstances of the present case, change in law on account of

promulgation of Indonesian Regulations and non-availability/short supply of domestic coal has been made out in favour of the Petitioner. After considering the provisions of the PPAs with regard to 'law', 'change in law', 'competent court' and 'governing law' and the judgements on interpretation of contracts, the Appellate Tribunal held that change in law provided under Article 13 of the PPAs with GUVNL and Haryana Utilities or clause 4.7 of the Competitive Bidding Guidelines (Guidelines) issued by the Central Government under Section 63 of the 2003 Act should not be construed to include laws other than Indian Laws such as the Indonesian Laws/Regulations prescribing benchmark price of the export of coal. Further, the Appellate Tribunal held that in the facts and circumstances of the case, the increase in price of coal on account of change in National Coal Distribution Policy (NCDP) linked to reduced availability of domestic coal and/or promulgation of Indonesian Regulations do not constitute an event of change in law attracting clause 4.7 of the Guidelines read with Article 13 of the PPA.

43. The Appellate Tribunal after examining the facts surrounding PPA dated 2.2.2007 with GUVNL and PPAs dated 7.8.2008 with Haryana Utilities came to the conclusion that the PPAs were fully or partially premised on imported coal from Indonesia. Further, the Appellate Tribunal examined certain provisions of the PPAs i.e. Article 12.1

(definition), 12.2 (Affected Party), 12.3 (meaning of Force Majeure including the enumerated events covered under Natural and Non-Natural Force Majeure Events), 12.4 (Force Majeure Exclusions), 12.6 (Duty to perform and Duty to mitigate), 12.7(a) (Available relief for a force majeure event) and Article 1.1 (Definition of Prudent Utility Practices) and came to the conclusion about force majeure as under:

> "282. For an event to fall in the category of *'Force Majeure',* it has to satisfy the requirements and tests laid down in Article 12.3 of the PPA. While this article recognises certain events as *Force Majeure,* it does not make the protection of *Force Majeure* available to the party claiming occurrence of *Force Majeure* Event easily. An Affected Party can successfully take a plea of *Force Majeure* Event if the Affected Party is seen to be vigilant and careful, who could not avoid the occurrence of the said event despite taking reasonable care and complying with prudent utility practices described in Article 1.1. The use of the words 'only if and 'to the extent that' make the rigour of this article clear. Protection of this article is available only if occurrence of such events or circumstances is not within the control of the Affected Party. Protection of this article is available to the extent that such events are not within the reasonable control of the Affected Party. Burden to prove the presence of these factors lies on the Affected Party."

44. The Appellate Tribunal ruled out the applicability of Article 12.3.1 (Natural Force Majeure Events) and Article 12.3.2 (Non-Natural Force Majeure Events) to the case of the Petitioner as under:

> "283. Article 12.3.1 refers to Natural *Force Majeure* Events with which we are admittedly not concerned. Article 12.3.2 refers to Non Natural *Force Majeure* Events. On a plain reading of this article, it is clear that the generators' case that there was a rise in Indonesian coal prices on account of Indonesian Regulation which is a *Force Majeure* Event does not fall in this article. Article 12.4 however is relevant…"

45. The Appellate Tribunal examined the provisions of Article 12.3 (excluding Articles 12.3.1 and 12.3.2), Article 12.4 and Article 12.7(a) of the PPAs and observed that the provisions of these articles in the PPAs

dealing with force majeure events are wider than the scope of Section 56 of the Indian Contract Act which deals with agreement to do impossible acts and their consequences. The Appellate Tribunal after examining the scope of Article 56 of the Indian Contract Act in the light of the judgement of the Hon'ble Supreme Court in Alopi Pershad and Satyabrata Ghose Cases observed the following:

> "289. These two judgments explain how Section 56 of the Indian Contract Act is to be read. Parties to a commercial contract are often faced with unexpected events such as abnormal rise or fall in prices of fuel or raw materials or a sudden depreciation of currency. Experienced businessmen take calculated risk and enter into a contract. Such unexpected events do not by themselves make the bargain made by them unworkable or frustrated. But, if the basic agreed terms of the contract are altered or wiped out and the parties find themselves in a situation which was never agreed upon or when they find themselves in a fundamentally different situation, the contract ceases to bind them as the performance of the contract becomes impossible. However, the word "impossible" has not to be interpreted to mean physical or literal impossibility. The performance of the contract may be impracticable. If due to fundamentally changed situation which was beyond the contemplation of the parties, performance of the contract becomes commercially impracticable, it can still be said that the promissor finds it impossible to do the act which he promised to do."

The Appellate Tribunal thereafter examined the provisions of Article 12.7(a) of the PPAs which provided that "no party shall be in breach of its obligations pursuant to this agreement to the extent the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event." After considering the scope of the term "hindered" appearing in Article 12.7(a) of the PPAs, the Appellate Tribunal came to the following conclusion:

> "292. ……Therefore, it is not an absolute rule that rise in price would never constitute hindrance. It would depend on the facts and circumstances of each case. In fact, change in fuel price is mentioned in Article 12.4 under the

heading "*Force Majeure* Exclusions". Change in fuel price if it is not within the reasonable control of the parties and is a consequence of *Force Majeure* Event, it will be covered by *Force Majeure*……The extensive correspondence to which we have made a reference establishes that the generators had communicated to MoP and to the procurers and others about the serious difficulties faced by them in performing their obligations under the long term PPAs because of rise in prices of imported coal due to promulgation of Indonesian Regulation. We have also made reference to all the facts surrounding the relevant PPAs of Adani Power and CGPL. All the relevant documents and events establish that the promulgation of Indonesian Regulation which resulted in unprecedented rise in prices of imported coal which wiped out the premise on which CGPL and Adani Power had offered their bids. It hindered or impaired the performance of their obligations under the contracts. Their case of occurrence of *Force Majeure* Event is therefore made out.

293. A generator may continue to supply electricity in spite of Force Majeure Event so that its assets are not stranded; that it can fulfill debt service obligations and that consumers can get uninterrupted power supply though a Force Majeure Event materially impairs the economic viability of its contract. The generator may do so with a hope that the Force Majeure clause in the PPA would take care of such a situation. If such a view is not taken, then the Force Majeure provision in the PPA would be a dead letter. In our opinion, Force Majeure clause found in the instant PPAs has a wider scope as stated by the Supreme Court in Dhanrajamal Gobindram and situations in which Adani Power and CGPL have landed themselves on account of Indonesian Regulation fall within the scope of Force Majeure Event. In fact, because PPAs are a long term contract and it may not be possible to envisage all possible risks over such a long period of time that Force Majeure and Change in Law are provided for in the PPAs. Simply stated as observed by the Supreme Court in Dhanrajamal Gobindram, the intention behind providing these clauses is to save the performing party from the consequences of anything over which it has no control and in that light, it can be concluded in the facts of this case that Indonesian Regulation resulted in rise in prices of imported coal which led to Force Majeure."

46. The Appellate Tribunal distinguished the normal business risks on account of rise in prices of fuel, raw materials etc. that the businessmen take from the case of the Petitioner which has been affected by the Indonesian Regulations in the following terms:

"300. It is true however that businesses involve risks and experienced businessmen are accustomed to such risks. The possibility of rise in prices of fuel, raw-material, etc. is always there and is known to the businessmen and it is anticipated by them yet they take calculated risk and enter into contracts and they cannot normally avoid contractual obligations. But, the present case

cannot be equated with the cases on which reliance is placed by the procurers because here we are not concerned with normal rise in prices. The Indonesian Regulation which is an act of Indonesian sovereign and over which the generators had no control at all, was a least expected event which hindered the performance of the contract.……..The law in Indonesia allowed export of coal at a negotiated price since 1967. The practice of negotiation with mines in Indonesia was in existence for more than 40 years. The generators have entered into a long term CSA with the mining companies in Indonesia. Indisputably, Indonesia was the cheapest source for India to procure imported coal. It is clear from the events surrounding the relevant PPAs, which we have noted above and the correspondence exchanged between the generators and the authorities that (i) the Indonesian Regulation impacted the economy of the generators; (ii) the generators had to pay exorbitantly high cost for import of coal from Indonesia making the fulfilment of their contractual obligations commercially impracticable and (iii) the Indonesian Regulation wiped out the fundamental premise on which the generators had quoted their bids thereby making their project commercially unviable. The generators took all reasonable care to assess the situation in Indonesia before executing contracts with Indonesian mining companies. In such a situation, relief available in the PPA can be granted to the generators, on the ground that their case falls in *Force Majeure*."

47. The Appellate Tribunal came to the conclusion that the Petitioner has been affected by force majeure and is entitled for relief as available under the PPAs. Relevant paras of the Full Bench Judgement dated 7.4.2016 are extracted as under:

"302. In view of the above, while inter alia, holding that tariff discovered through competitive bidding process under Section 63 of the said Act cannot be tampered with as it is sacrosanct and that where the tariff is so discovered, the Appropriate Commission cannot grant compensatory tariff to the generators by using the regulatory power under Section 79(1)(b), we hold that the generators have made out a case of Force Majeure. We hold that promulgation of Indonesian Regulation has resulted in a Force Majeure Event impacting the projects of Adani Power and CGPL adversely. The generators would, therefore, be entitled to relief only as available under the PPA…"

"303. In view of the above discussions, we hold that the increase in price of coal on account of the intervention by the Indonesian Regulation as also the non-availability/short supply of domestic coal in case of Adani Power constitute a Force Majeure Event in terms of the PPA. Accordingly, we answer Issue No.12 in the affirmative. In view of the judgment of this Tribunal dated 7/9/2011 in Appeal No.184 of 2010, we also hold that the bid for generation and sale of electricity by Adani Power to GUVNL was not solely premised on the availability of coal from GMDC. Admittedly, Adani Power sourced coal from Indonesia to fulfill its contractual obligations. Accordingly, Issue No.13 is

answered in the negative. We also hold that the bid for generation and sale of electricity by Adani Power to Haryana Utilities was affected by non-availability of coal from Mahanadi Coalfields Limited. The shortfall in domestic coal was made good by Adani Power by importing Indonesian coal. We answer Issue No.14 in the affirmative."

48. In the light of the decision of the Appellate Tribunal as extracted above, it clearly emerges that the Appellate Tribunal after interpreting the provisions of Article 12.3, 12.4, 12.6 and 12.7(a) of the PPAs came to the conclusion that since the increase in price of coal on account of the intervention by the Indonesian Regulation as also the non-availability/short supply of domestic coal is not within the control of the Petitioner and is a consequence of force majeure event, it will be covered under force majeure. The Appellate Tribunal further observed that the intention behind providing force majeure clauses in the PPAs is to save the performing party from the consequences of anything over which it has no control. After considering the events surrounding the PPAs entered into by the Petitioner and noting the fact that Indonesian Regulations being a sovereign act of the Republic of Indonesia over which the Petitioner has no control, the Appellate Tribunal has recorded the findings that: (i) the Indonesian Regulation impacted the economy of the Petitioner; (ii) the Petitioner has to pay exorbitantly high cost for import of coal from Indonesia making the fulfilment of its contractual obligations under the PPAs commercially impracticable; and (iii) the Indonesian Regulations wiped out the fundamental premise on which the

Petitioner had quoted its bids thereby making its project commercially unviable. Accordingly, the Appellate Tribunal declared the promulgation of Indonesian Regulations and shortfall of coal due to non-availability of coal from Mahanadi Coalfield Limited as force majeure events affecting the viability of Mundra Power Project of the Petitioner. In view of the conclusive findings of the Appellate Tribunal that the Petitioner has been affected by force majeure event on account of the Indonesian Regulations, this Commission has to be necessarily guided by the said findings and cannot enter into any discussion whether occurrence of force majeure event in case of the Petitioner has been made out or not. The Appellate Tribunal has further observed that "a generator may continue to supply electricity in spite of Force Majeure Event so that its assets are not stranded; that it can fulfil debt service obligations and that consumers can get uninterrupted power supply though a Force Majeure Event materially impairs the economic viability of its contract. The generator may do so with a hope that the Force Majeure clause in the PPA would take care of such a situation. If such a view is not taken, then the Force Majeure provision in the PPA would be a dead letter." In other words, the Appellate Tribunal has held that if an affected party has discharged its contractual obligations despite its economic viability being impaired by the force majeure event, it will still be considered as being affected by force majeure. Therefore, the fact that the Petitioner

continued to supply electricity to the procurers by buying coal at the benchmark price in accordance with the Indonesian Regulations cannot be held against the Petitioner and the Petitioner shall be considered as being affected by force majeure. In the light of the clear-cut findings of the Appellate Tribunal with regard to the occurrence of force majeure in case of the Petitioner, the scope of the remand does not extend to the enquiry (i) whether the promulgation of Indonesian Regulations aligning coal price imported from Indonesia to the benchmark price and non-availability/short supply of coal by Mahanadi Coalfield Limited to the Petitioner constitutes Force Majeure, (ii) whether the promulgation of Indonesian Regulations has impacted price of coal procured by the Petitioner for supply of power to the Procurers. These issues have been settled by the Appellate Tribunal and falls beyond the scope of remand.

49. The Appellate Tribunal has directed the Commission to assess the impact of force majeure on the project of the Petitioner and grant such relief as may be available under the respective PPAs and in the light of the judgement after hearing the parties. Therefore the scope of the remand is confined to find out (i) the provisions of the PPAs regarding relief to be granted to the Petitioner on account of force majeure arising out of the promulgation of Indonesian Regulations and the shortfall in the supply of coal by MCL; (ii) the assessment of the impact of Force

Majeure event on the price of coal used at Mundra Power Project of the Petitioner for supply of contracted capacity and scheduled energy to the Procurers under the PPAs; and (iii) the observation/analysis of the Appellate Tribunal with regard to the relief to be granted to the Petitioner.

II. The provisions of the PPAs and the observations in the Full Bench Judgment under which relief can be granted

50. The Petitioner has submitted that Article 12.7 is the foundation for granting relief on account of Force Majeure events. Article 12.7(b) is an inclusive clause which provides that an affected party is entitled to relief, including the relief under Article 4.5 of the PPA. The Petitioner has submitted that as per the settled position of law, the use of the word 'include' in a definition expands its scope and accordingly, the remedies available under Article 12.7(b) of the PPAs are wide and encompass any/all other reliefs/remedies available to the Petitioner which would lighten or remove the hardship and save the Petitioner from the consequences of such force majeure events and enable it to perform its obligations under the PPAs. The Petitioner has submitted that the relief to be granted for force majeure should restitute the Petitioner to the same economic position for offsetting the commercial impracticability caused due to the promulgation of Indonesian Regulations and shortfall of domestic coal, which have been held as Force Majeure events under

the PPAs. The Petitioner has further submitted that Article12.7 read with Article 17.3 of the PPAs gives adjudicatory powers to the Commission to mould a relief, in the facts and circumstances of the present case, to mitigate the adverse impact of Indonesian Regulations as well as non-availability/short supply of domestic coal and enable the Petitioner to continue performance of its obligations under the PPAs unhindered. The Petitioner has submitted that the relief available to the Petitioner as an Affected Party cannot be restricted to illustrative reliefs mentioned in Article 12.7(c) to (g) of the PPAs. The Petitioner has submitted that in a scenario where the cost of generation has increased due to force majeure event, the affected party/generating company deserves to be saved from consequence of the Force Majeure by allowing increase in Energy Charge payable by the Procurers to the extent the energy cost has increased because of force majeure events. The Petitioner has submitted that as the Petitioner has been supplying power to the Procurers and has fulfilled its obligations under the PPAs, it is entitled for the relief in terms of Article 12.7(b) read with Article 17.3 of the PPA and in light of the Full bench Judgment.

51. GUVNL has submitted that as per the PPA dated 2.2.2007 between the Petitioner and GUVNL, the relief available under force majeure provisions of the PPA as specified in Article 12.7 may be

considered while assessing the impact of Force Majeure. Haryana Utilities have submitted that the relief in terms of the Full Bench judgement may be granted after considering certain observations of Haryana Utilities pertaining to FERV, quantum of coal under linkage, manner and mode of deciding pricing of coal, Station Heat Rate, GCV of imported coal and sharing of Indonesian mining profit etc. In the consolidated written submission, Prayas has argued that in terms of the Full Bench judgement, the Petitioner needs to establish to the satisfaction of the Commission that the extent of relief claimed satisfies the conditions that (a) it falls within the scope of specific force majeure events as found in the decision of the Appellate Tribunal; and (b) the relief claimed is as per the provisions of the relevant PPAs and if either of the said conditions is not satisfied, then the Petitioner is not entitled for any relief notwithstanding the findings by the Appellate Tribunal that Indonesian Regulations constitute Force Majeure. Prayas has submitted that in terms of Article 12.7(a) and (b) of the PPA, there cannot be any relief on termination or suspension of the PPA and such a relief had been expressly barred by the Hon'ble Supreme Court in the order dated 31.3.2014 passed in Civil Appeal No.10016 of 2014. The Petitioner therefore cannot terminate or suspend the PPAs or otherwise stop generating and supplying electricity to the procurers. Prayas has further submitted that the available relief under Article 12.7 is restricted to the

consequence of direct and Indirect Non-Natural Force Majeure events and further at a maximum available to debt service obligations and no other tariff element. Prayas has submitted that the Petitioner has neither pleaded nor given any material that its debt service obligations were affected or not fulfilled on account of force majeure events. Prayas has further submitted that the claim of the Petitioner is not for breach of failure or default on the part of the Procurers and the Petitioner becoming entitled to claim compensation as a non-defaulting party from a defaulting party in terms of Sections 73 and 74 of the Indian Contract Act and reliance on the said sections of Indian Contract Act by the Petitioner to claim relief is misconceived.

52. We have considered the submissions of the parties. The matter has been remanded to the Commission to assess the impact of the force majeure on the project of the Petitioner and grant such relief as may be available under the respective PPAs and in the light of the Full Bench Judgement. In terms of the PPA dated 2.2.2007 entered into by the Petitioner with GUVNL and the PPAs dated 7.8.2008 entered into by the Petitioner with Haryana Utilities, the relief available for the occurrence of the force majeure event is provided in Article 12.7 of the respective PPAs. Provisions of Article 12.7 in both the PPAs are similar. For the

purpose of examination of the issue, Article 12.7 of PPA dated 2.2.2007 with GUVNL has been extracted as under:-

"12.7 Available Relief for a Force Majeure Event:

Subject to this Article 12:

(a) no party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a force majeure event;

(b) every party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 4.5;

(c) for the avoidance of doubt, it is clarified that no tariff shall be paid by the procurer for the part of Contracted Capacity affected by a Natural Force Majeure Event affecting the Seller, for the duration of such Natural Force Majeure Event. For the balance Part of the Contracted Capacity, the procurer shall pay tariff to the seller, provided during such period of Natural Force Majeure Event, the balance Part of the Power Station is declared to be available for scheduling and dispatch as per ABT for supply of power by the seller to the procurer;

(d) if the average Availability of the power station is reduced below sixty (60) percent for over two (2) consecutive months or for any non-consecutive period of four (4) months both within any continuous period of sixty (60) months, as a result of an Indirect Non Natural Force Majeure, then, with effect from the end of that period and for so long as the daily average Availability of the Power Station continues to be reduced below sixty (60) percent as a result of an Indirect Non Natural Force Majeure of any kind, the procurer shall make payments for Debt Service, subject to a maximum of Capacity Charges based on Normative Availability, relatable to such Unit, which are due under the Financing Agreements, and these amounts shall be paid from the date, being the later of (a) the date of cessation of such Indirect Non Natural Force Majeure Event and (b) the completion of sixty (60) days from the receipt of the Financing Agreements by the procurer from the seller, in the form of an increase in Capacity Charge. Provided such Capacity Charge increase shall be determined by the Appropriate Commission on the basis of putting the seller in the same economic position as the seller would have been in case the seller had been paid Debt Service in a situation where the Indirect Non Natural Force Majeure had not occurred;

Provided that the procurer will have the above obligations to make payment for the Debt Service only (a) after the Unit(s) affected by such indirect Non Natural Force Majeure has achieved COD, and (b) only if in the absence of such Indirect Non Natural Force Majeure Event, the

availability of such commissioned Unit(s) of the contracted capacity would have resulted in capacity charges equal to Debt Service.

(e) if the average availability of the power station is reduced below eighty (80) per cent for over two (2) consecutive months or for any non-consecutive period of four (4) months both within any continuous period of sixty (60) months, as a result of a Direct Non Natural Force Majeure, then, with effect from the end of that period and for so long as the daily average availability of the power station continues to be reduced below eighty (80) percent as a result of a Direct Non Natural Force Majeure of any kind, the seller may elect in a written notice to the procurer, to deem the availability of the power station to be eighty (80) per cent from the end of such period, regardless of its actual available capacity. In such a case, the procurer shall be liable to make payment to the seller of capacity charges calculated on such deemed normative availability, after the cessation of the effects of Direct Non Natural Force Majeure in the form of an increase in Capacity Charge. Provided such capacity charge increase shall be determined by the Appropriate Commission on the basis of putting the seller in the same economic position as the seller would have been in case the seller had been paid capacity charges in a situation where the Direct Non Natural Force Majeure had not occurred.

(f) For so long as the seller is claiming relief due to any Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the procurer) under this Agreement, the procurer may from time to time on one (1) day's notice inspect the project and the seller shall provide the procurer's personnel with access to the project to carry out such inspections, subject to the procurer's personnel complying with all reasonable safety precautions and standards. Provided further the procurer shall be entitled at all times to request Repeat Performance Test, of such part of the Contracted Capacity commissioned earlier and now affected by Direct or Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer), where such testing is possible to be undertaken in spite of the Direct or Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer), and the Independent Engineer accepts and issues a Final Test Certificate certifying such Unit(s) being capable of delivering the Contracted Capacity and being Available, had there been no such Direct or Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer). In case the Available Capacity as established by the said Repeat Performance Test (provided that for such Repeat Performance Test the limitation imposed by Article 8.1.1 shall not apply) and Final Test Certificate issued by the Independent Engineer is less than the Available Capacity corresponding to which the seller would have been paid capacity charges equal to debt service in case of Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer), then the Procurer shall make pro-rata payment of Debt Service but only with respect to such reduced Availability. For the avoidance of doubt if Debt Service would have been payable at an Availability of 60% and pursuant to a Repeat Performance Test it is established that the Availability would have been 40%, then the

procurer shall make payment equal to Debt Service multiplied by 40% and divided by 60%. Similarly, the payments in case of Direct Non Natural Force Majeure Event (and Natural Force Majeure Event affecting the procurer) shall also be adjusted pro-rata for reduction in Available Capacity;

(g) In case of Natural Force Majeure Event affecting the procurer which adversely affects the performance obligations of the seller under this Agreement, the provisions of sub-proviso (d) and (f) shall apply."

53. Perusal of the above provisions reveals that under Clause (a) of Article 12.7 of the PPA, an affected party is held to be not in breach of its obligations to the extent the performance of its obligations under the PPA is prevented, hindered or delayed due to Force Majeure Event. In other words, an affected party is discharged from its obligations under the PPA during the period of force majeure. Clause (b) of Article 12.7 provides that both the seller and procurers shall be entitled to claim relief in relation to the Force Majeure Event in regard to their obligations including, but not limited to those specified under Article 4.5 of the PPAs. Clauses (c) to (g) of Article 12.7 deal with the relief when the project is affected by Natural Force Majeure Event and Non Natural Force Majeure Events. Since, Mundra Power Project of the Petitioner is neither affected by Natural Force Majeure Events or by Non Natural Force Majeure Events, these provisions have no applications in the facts of the present case. The Appellate Tribunal in Para 283 of the Full Bench Judgment has observed as under:-

"283. Article 12.3.1 refers to Natural Force Majeure Events with which we are admittedly not concerned. Article 12.3.2 refers to Non Natural Force Majeure

> Events. On a plain reading of this article, it is clear that the generators' case that there was a rise in Indonesian coal prices on account of Indonesian Regulation which is a Force Majeure Event does not fall in this article….."

In view of the clear cut finding of the Appellate Tribunal that Article 12.3.1 and 12.3.2 dealing with Natural Force Majeure Events and Non Natural Force Majeure Events do not cover the case of the Petitioner, it follows that the reliefs envisaged in Clauses (c) to (g) of Article 12.7 will also not be applicable in case of the Petitioner.

54. Prayas in its reply dated 25.5.2016 has submitted that the available relief under Article 12.7 is restricted to consequences of Direct and Indirect Non Natural Force Majeure Events and further at the maximum available to debt service obligations. We are unable to agree with the submissions of Prayas. As already mentioned, the provisions of Clauses (c) to (g) of Article 12.7 relate to the relief for Natural and Non Natural Force Majeure Events which are enumerated in Article 12.3.1 and Article 12.3.2 of the PPAs. Clauses (c) to (g) of Article 12.7 do not control the provisions of Clauses (a) and (b) of the said Article. Clauses (a) and (b) of Article 12.7 are independent provisions designed to safeguard the interest of both the seller and the procurer, if any of them is affected by a Force Majeure Event which is not covered under Article 12.3.1 and Article 12.3.2 of the PPA. Article 12.3 (excluding Article 12.3.1 and 12.3.2) and Article 12.4 read as under:-

"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 Agreements, 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."

"12.4 Force Majeure Exclusions:

Force Majeure shall not include (i) any event or circumstances which is within the reasonable control of the parties and (ii) the following conditions, except to the extent that they are consequences of an event 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."

Article 12.3 provides an inclusive definition of Force Majeure. It says that Force Majeure means any event or circumstance or combination of events or circumstances including those stated below (i.e. as stated in Article 12.3.1 and 12.3.2 of the PPAs) that wholly or partly prevents or unavoidable delays an effected party in the performance of its obligations under the Agreement. The words "including those stated below" relate to the Natural Force Majeure Events and Non Natural Force Majeure Events both Direct and Indirect. Therefore, the definition of Force Majeure is wide enough to include any event or circumstance or combination of events or circumstances which do not fall under Natural and Non Natural Force Majeure Events but they wholly or partially prevent or delay the affected party in the performance

of its obligations. Article 12.4 of the PPA dealing with Force Majeure Exclusions provides that any event or circumstance which is within the reasonable control of the parties and falls under the conditions enumerated in Clause (a) to (f) under the said Article shall not be included under Force Majeure. However, it is subject to an exception that to the extent Clauses (a) to (f) are consequence of an event of Force Majeure, they shall be considered as Force Majeure. Clause (a) of Article 12.4 deals with "unavailability, late delivery, or changes in the cost of plant, machinery, equipment, materials, spare parts, fuel or consumable goods for the project". Therefore, changes in the cost of the fuel for the project if it is the result of a Force Majeure Event shall be considered as Force Majeure. The Appellate Tribunal in Para 283 has discussed the provisions of Article 12.4 of the PPA as under:-

> "283..... Article 12.4 however is relevant. It refers to "Force Majeure Exclusions". It reiterates that Force Majeure shall not include anything within the reasonable control of the parties. It delineates certain conditions specifically as not being covered by Force Majeure. However, this is qualified by adding that if those delineated conditions are the consequences of an event of Force Majeure they would be covered by Force Majeure. Changes in the cost of fuel are one of the conditions. Thus, if changes in the coal/fuel are not within the reasonable control of the parties and they are consequences of an event of Force Majeure, they would be covered by Force Majeure. Agreement becoming onerous to perform would be covered by Force Majeure if it is a consequence of an event of Force Majeure…."

Further, in Para 300 of the Full Bench Judgement, the Appellate Tribunal has observed as under:-

> "300. ... The possibility of rise in prices of fuel, raw-materials etc, is always there and is known to the businessmen and it is anticipated by them yet they take calculated risk and enter into contracts and they cannot normally avoid

contractual obligations. But, the present case cannot be equated with the cases on which reliance is placed by the procurers because here we are not concerned with normal rise in prices. The Indonesian Regulation which is an act of Indonesian sovereign and over which the generators had not control at all, was least expected event which hindered the performance of the contract..... It is clear from the events surrounding the relevant PPAs, which we have noted above and the correspondence exchanged between the generators and the authorities that (i) the Indonesian Regulation impacted the economy of the generators; (ii) the generators had to pay exorbitantly high cost for import of coal from Indonesian making the fulfilment of their contractual obligations commercially impracticable and (iii) the Indonesian Regulation wiped out the fundamental premise on which the generators had quoted their bids thereby making their project commercially unviable."

From the above findings of the Appellate Tribunal, it clearly emerges that Indonesian Regulations has been held as an event of Force Majeure since it was a sovereign act of the Republic of Indonesia over which the Petitioner has no control. Since, the promulgation of the Indonesian Regulations led to the rise in prices of coal, which has impaired the ability of the Petitioner to discharge its obligations under the PPAs, such rise in prices of coal has been held as an event of Force Majeure in terms of Article 12.4 (a) of the PPAs. Therefore, the finding of the Appellate Tribunal with regard to the impact of Indonesian Regulations on the price of coal imported by the Petitioner as an event of Force Majeure is independent of the provisions of Article 12.3.1 and Article 12.3.2 dealing with Natural and Non Natural Force Majeure Events. It therefore follows that relief contemplated for Force Majeure Event determined in terms of Article 12.3 read with Article 12.4 cannot be controlled by the reliefs meant for Natural and Non Natural Force Majeure Events and will go beyond the Clauses (c) to (g) of Article 12.7

of the PPA. In fact, the scope of Article 12.7(b) is much wider than the reliefs provided under clauses (c) to (g) of the said article. In view of the above discussion, we reject the contention of Prayas that relief under Article 12.7 would be restricted to the consequences of Direct and Indirect Non Natural Force Majeure Events and at the maximum available for debt service obligations.

55. Article 12.7 (b) provides that both parties shall be entitled to claim relief in relation to a Force Majeure Event in regard to their obligations including but not limited to those specified under Article 4.5 of the PPA. Article 4.5 of the PPA provides as under:-

> "4.5 Extensions of Time
>
> 4.5.1 In the event that:
>
> (a) the Seller is prevented from performing its obligations under Article 4.1.1(b) by the stipulated date, due to any procurer event of default; or
>
> (b) the contracted capacity cannot be commissioned by its scheduled commercial operations date because of Force Majeure Event;
>
> the Scheduled Commercial Operations Date, the Scheduled Connection Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.5.3 for a reasonable on 'day for a day' basis, to permit the seller through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the seller or in the case of the procurer's event of default, till such time the default is rectified by the procurer."

Article 4.5.1 deals with the deferment of scheduled commercial date, the Scheduled Connection Date and the Expiry Date if the contracted capacity cannot be commissioned by the scheduled

commercial operation date on account of procurers' event of default or on account of force majeure event. In other words, Article 4.5.1 deals with force majeure event affecting the generating station prior to the COD and does not deal with the force majeure event affecting the generating station after the COD. Article 12.7(b) uses the expression "obligations including but not limited to those specified under Article 4.5" which means that apart from the obligation of declaration of COD by the scheduled COD as specified in the PPA, the project developer has other obligations which include the obligation of the Petitioner to sell the contracted capacity to the procurers and the obligations of the procurers to pay the tariff to the Petitioner for all the available capacity upto the contracted capacity and the scheduled energy throughout the term of the PPA. Articles 4.3 and 4.4.1 of the PPA is extracted in this connection:

> "4.3 Purchase and sale of Contracted Capacity and Electrical Output
>
> 4.3.1 Subject to the terms and conditions of this Agreement, the seller undertakes to sell to the procurer, and the procurer undertakes to pay the tariff for all of the available capacity up to the contracted capacity and scheduled energy throughout the term of this Agreement.
>
> 4.3.2 Unless otherwise instructed by the procurer, the seller shall sell all the available capacity up to the contracted capacity to the procurer pursuant to dispatch instructions."

Further, Article 4.4.1 of the PPA provides as under:-

> "4.4.1 Subject to other provisions of this Agreement, the entire contracted capacity of the power station shall at all times after the commercial operation date be for the exclusive benefit of the procurer and the procurer shall have the exclusive right to purchase the entire contracted capacity from the seller.

The seller shall not grant to any third party or allow any third party to obtain any entitlement to the contracted capacity and/or Scheduled Energy."

As per the above provisions, the Petitioner has an obligation to sell all the available capacity upto the contracted capacity and the scheduled energy to the procurers throughout the terms of the PPAs. Similarly, the procurers have a right to the entire contracted capacity at all times after the commercial operation date and have obligations to pay the tariff for all the available capacity upto the contracted capacity and the scheduled energy throughout the terms of the PPA. If, after the commercial operation date, the Petitioner and the procurers are affected by a force majeure event, then they are entitled for relief in relation to force majeure in regard to their obligations under the PPA in terms of Article 12.7 (b). In the present case, the Petitioner is affected by force majeure on account of promulgation of the Indonesian Regulations and non-availability or short supply of domestic coal which has impaired its ability to supply the available capacity upto the contracted capacity and the scheduled energy to the procurers at the tariff agreed in the PPA. As observed by the Appellate Tribunal, "the fact that in this case generators went on supplying electricity to the procurers will not necessarily lead to the conclusion that there was no occurrence of force majeure." The Appellate Tribunal has further observed that "a generator may continue to supply electricity in spite of force majeure event so that its assets are

not stranded; that it can fulfil debt service obligations and the consumers can get uninterrupted power supply though a force majeure event materially impairs the economic viability of the contract. The generator may do so with the hope that force majeure clause in the PPA would take care of such a situation. If such a view is not taken, then force majeure provision in the PPA would be a dead letter." Moreover in para 300 of the judgement, the Appellate Tribunal has succinctly observed that "(i) the Indonesian Regulations impacted the economy of the generators; (ii) the generators had to pay exorbitantly high cost for import of coal from Indonesia making the fulfilment of their contractual obligations commercially impracticable; and (iii) the Indonesian Regulations wiped out the fundamental premise on which the generators had quoted the bids thereby making their projects commercially unviable". Therefore, the judgement of the Appellate Tribunal clearly brings out that the Petitioner's ability to discharge its obligations to supply power under the PPA to the procurers at the PPA tariff was impaired on account of the exorbitant price that the Petitioner has to pay to procure coal from Indonesia subsequent to the promulgation of Indonesian Regulations which has been held as an event of force majeure. Despite having to pay exorbitant price for procurement of coal, the Petitioner continued to supply electricity to the procurers and therefore, the Petitioner is entitled for relief to the extent it incurred the

additional expenditure on account of Indonesian Regulations in order to discharge its obligations under the PPAs. In the light of the findings of the Appellate Tribunal with regard to force majeure on account of Indonesian Regulations, the provisions of the PPA with regard to the Petitioner's obligations for supply of contracted capacity and scheduled energy to the procurers and the procurers' obligations to pay the tariff to the Petitioner under Article 4.3 of the PPAs, and relief for force majeure with regard to the obligations as envisaged in Article 12.7(b) of the PPA, we are of the view that the Petitioner needs to be granted relief in the form of enhanced tariff to save it from the adverse impact of the force majeure on account of Indonesian Regulations so that the Petitioner can make uninterrupted supply of electricity to the procurers in terms of the PPAs.

56. Prayas has argued that the Petitioner is not entitled to the benefits of Article 12.7(a) and (b) of the PPA. In para 67 of the Consolidated Written Submission filed by Prayas, the following plea has been taken:

> "67. In terms of Article 12.7 (a) and (b) there cannot however be any relief on termination or suspension of the PPA as such a relief had been expressly barred by the Hon'ble Supreme Court in the order dated 31.3.2015 passed in Civil Appeal No.10016 of 2014. Adani Power cannot, therefore, terminate or suspend the PPA or otherwise stop generating and supply of electricity to the procurers."

The Hon'ble Supreme Court in the order dated 31.3.2015 in Civil Appeal No.10016 of 2014 observed that if Adani Power is not desirous

of seeking declaration that it is relieved of the obligations to perform the contracts in question, the correctness of the decision of this Tribunal in rejecting the application to condone delay would become purely academic. The Supreme Court further observed that so long as Adani Power does not seek declaration of frustration of contracts resulting in relieving it of its obligations arising out of the contracts, it is entitled to argue any proposition of law, be it Force Majeure or Change in Law, in support of Order dated 2.4.2013 quantifying the compensatory tariff, the correctness of which is under challenge before this Tribunal in Appeal No. 98 of 2014 and Appeal No. 116 of 2014 preferred by the procurers. The Appellate Tribunal in the judgement dated 7.4.2016 after interpreting the judgement of the Hon'ble Supreme Court has held that "Adani Power can urge Force Majeure and Change in Law in support of Order dated 21/2/2014 with only one restriction that it cannot urge that on account of the said grounds, the contracts are frustrated and it must be relieved of its obligations under the contracts." The Petitioner argued its case for change in law and force majeure before the Appellate Tribunal and based on the submission, the Appellate Tribunal held that case for force majeure on account of the impact of Indonesian Regulations has been made out by the Petitioner and directed this Commission to assess the impact of Force Majeure and grant relief as available under the PPAs. The Petitioner in none of its pleadings before

the Commission after the remand has claimed that it wants to be released from its obligations under the PPA to supply power to the procurers unless it is compensated for the force majeure event. On the other hand, the case of the Petitioner is that since its ability to supply power at the contracted tariff has been severely impaired on account of Force Majeure due to Indonesian Regulations, it needs to be compensated under Article 12.7(b) for performing its obligations under the PPAs. In our view, the provisions of clause (a) and (b) need to be read together in order to understand their implications for arriving at the relief for force majeure. Clause (a) of Article 12.7 provides that no party shall be in breach of its obligations pursuant to the PPA to the extent the performance of its obligations has been prevented, hindered or delayed due to Force Majeure event. The Appellate Tribunal has held that the ability of the Petitioner to perform its obligations to supply power to the procurers at the PPA tariff has been hindered or impaired due to Indonesian Regulations. Therefore the Petitioner shall not be in breach of its obligations under the PPA if it fails to supply power at the PPA tariff during the period it is affected by force majeure. Clause (b)of Article 12.7 says that both parties shall be entitled to claim relief in relation to force majeure event in regard to performance of their obligations which is not limited to deferment of SCOD in terms of Article 4.5. Where the Petitioner is not in breach of the agreement to the extent its ability to

discharge its obligation was affected by force majeure and despite being affected by force majeure, the Petitioner continues to supply power to the procurers by incurring additional expenditure to procure coal from Indonesia and the procurers have enjoyed the benefit of such power, the procurers are under a reciprocal obligations to compensate the additional expenditure incurred by the Petitioner to supply power in terms of Article 12.7 (b) of the PPA.

57. Prayas has further argued that Article 12.7 (b) does not deal with the ability of the Petitioner to claim any increased cost or price for the performance of its obligations or the right of the affected party to get monetary compensation in any manner. The Petitioner on the other hand has argued that the remedies available under Article 12.7(b) are wide and encompasses any/all other reliefs/remedies available to a party which in the facts of the case would lighten or remove the hardship caused to a party and save the performing party from the consequence of force majeure events and enable it perform its obligations under the PPA. The Petitioner has submitted that in terms of the Full Bench judgement of the Appellate Tribunal, the Commission is empowered under Section 79(1)(f) read with Article 17.3 and Article12 of the PPA to provide relief to the Petitioner which would offset the effect of force majeure event. In our view, Prayas has taken a very narrow view of the

provisions of Article 12.7(b) of the PPA. In a case where the force majeure has resulted in additional expenditure on the part of the Petitioner to procure coal to supply power to the procurers in discharge of its obligations, the relief must necessarily relate to removing the hardship by compensating the Petitioner for the said force majeure event so that commercial viability of the Petitioner is restored so that the Petitioner is able to discharge its obligations under the PPA.

58. Learned Senior Counsel for the Petitioner submitted during the hearing that PPA is a commercial contract and the principles of Section 70 of the Contract Act can be applied to grant relief to the Petitioner as the Petitioner continued to supply power to the Procurers despite being affected by force majeure and the Procurers having received power are liable to restitute the Petitioner for the force majeure. Section 70 of the Indian Contract Act provides as under:

> "70. Obligation of person enjoying benefit of non-gratuitous act.- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect thereof, or to restore, the thing so done or delivered."

In order to attract the benefit of this Section, three conditions are required to be satisfied, namely, (a) the person must have done the thing lawfully; (b) the person must not have intended to do so gratuitously; and (iii) the other person must have enjoyed the benefit. In the present case,

there is a PPA between the Petitioner and Procurers for supply of power by the Petitioner in consideration of the tariff agreed in the PPA. Therefore, supply of power by the Petitioner to the Procurers is made lawfully in terms of the PPA. In terms of Article 12.7(a), when a Party is affected by Force Majeure, it is relieved from its obligations under the PPA which includes supply of power at the PPA tariff under Article 4.3 of the PPA. It has been held by the Appellate Tribunal that the Petitioner is affected by force majeure on account of Indonesian Regulations which impaired its ability to supply power at PPA tariff. In other words, for the period the Petitioner is affected by Force Majeure, it is relieved from its obligations to supply power to the Procurers at the PPA tariff. Despite not being under the obligations to supply power during the period of Force Majeure in terms of Article 12.7(a) of the PPA, the Petitioner has supplied power to the Procurers after putting the Procurers on notice that the Petitioner was not in a position to supply power at PPA tariff on account of Indonesian Regulations and sought compensation from the Procurers. In that event, the Procurers had the option either to compensate the Petitioner for the additional cost incurred by the Petitioner to supply power to the Procurers or to refuse to accept supply of power at higher tariff. Despite having knowledge that Indonesian Regulations had the impact on the cost of power generated from Mundra Power Project, the Procurers accepted the supply of power and enjoyed

its benefits. Therefore, the case of the Petitioner fulfils the conditions of Section 70 of the Indian Contract Act and the Procurers who have accepted the supply of power from the Petitioner and enjoyed its benefits, are liable to compensate the Petitioner for the additional cost which the Petitioner incurred to ensure supply of power by purchasing coal at Benchmark Price subsequent to promulgation of Indonesian Regulations.

59. In view of the above discussion, we conclude that the petitioner is entitled to relief in tariff to the extent its ability to discharge its obligations under the PPA was impaired on account of occurrence of force majeure events consequent to promulgation of Indonesian Regulations and non-availability/ short supply of Domestic coal for the following reasons:

(a) The Appellate Tribunal has conclusively held that promulgation of Indonesian Regulations is an event of force majeure under the PPA as it has impaired the ability of the Petitioner to supply power at PPA tariff by buying coal from Indonesia at Benchmark Price.

(b) The Petitioner in terms of Article 12.7(a) had the option to be released from its obligations to supply power to the Procurers at PPA tariff during the period of force majeure without attracting any penalty under the PPA.

(c) Article 12.7(b) entitles every Party shall be entitled to claim relief in relation to a force majeure event in regard to its obligations including but not limited to Article 4.5 of the PPA. Article 4.5 deals with extension of the period of commercial operation and the scope of Article 12.7(b) expands beyond Article 4.5 to cover other obligations of the parties under the PPA.

(d) Under Article 4.3 of the PPA, the Petitioner has the obligation to supply the available capacity upto the contracted capacity and scheduled energy to the Procurers throughout the terms of the PPA and the Procurers have the obligations to pay tariff for such supply of power. If the obligation to supply power at the PPA tariff is affected by the Indonesian Regulation being a force majeure event, the Petitioner is entitled for relief to the extent it incurred the additional expenditure on account of Indonesian Regulations in discharge of its obligations under the PPA.

(e) In terms of Article 70 of the Indian Contract Act, the Procurers who have accepted the supply of power from the Petitioner during the period of force majeure and enjoyed the benefits, are liable to compensate the Petitioner for the additional cost which the Petitioner incurred to ensure supply of power by purchasing coal at

Benchmark Price subsequent to promulgation of Indonesian Regulations.

(f) Reliefs under Article 12.7(c) to (g) of the PPAs are relatable to the force majeure events covered under Articles 12.3.1 and 12.3.2 of the PPAs. It has been held by the Appellate Tribunal that the case of the Petitioner does not fall under Articles 12.3.1 and 12.3.2 of the PPAs and therefore, reliefs under Article 12.7(c) to (g) of the PPAs are not applicable in the case of the Petitioner.

III. Coal Supply Agreements regarding imported coal

60. The Petitioner has submitted that in case of PPA dated 2.2.2007 with GUVNL, the long term coal supply agreement entered by the Petitioner was directly impacted by the Indonesian Regulations with effect from 24.9.2011 as the said coal supply agreement provides for supply of coal from Indonesia @ US$ 36 PMT CIF (25.7 USD of FoB and 10.3 USD of Ocean Freight) for coal of 5200 GCV and other specifications set out therein. However, due to enactment of Indonesian Regulations, the Petitioner is forced to procure coal at the benchmark FoB prices notified by Government of Indonesia on monthly basis (HBA prices) which is higher than the agreed price in the CSA. In case of Haryana PPA, 70% of contracted capacity of Haryana PPA is based on domestic coal supplies by CIL and balance 30% contracted capacity is

based on imported coal to be procured from Indonesia. The imported coal was to be procured at USD 36 per MT CIF (25.7 USD of FoB and 10.3 USD of Ocean Freight) for 5200 GCV under aforesaid long term coal supply agreement. Under the NCDP dated 18.10.2007 issued by Ministry of Coal, supply of coal to the extent of 100% of normative requirement was assured to all generating companies including Independent Power Producers (IPP) and accordingly FSAs were executed with Coal India Limited (CIL) or its subsidiaries for supply of coal at CIL notified prices. Due to acute shortage in availability of domestic coal, the CIL has been unable to meet the commitments made to the generating companies under NCDP which has led to additional reliance on costly alternate coal (i.e. imported coal). The Petitioner has submitted that the cost of coal has increased for Haryana PPA on account of Force Majeure events i.e. shortage of domestic coal and increase in coal prices of imported coal due to promulgation of Indonesian Regulation.

61. In the Supplementary Record of Proceedings, the Commission directed the Petitioner to submit the following documents:

> "All FSAs/CSAs entered into by Adani Power Limited with the coal mining companies in Indonesia for supply of power from Mundra Power Project. If intermediary companies are involved, then the copies of the FSAs/CSAs between Adani Power Limited and the intermediary companies and back to back FSA/CSAs between intermediary companies and the coal companies in Indonesia."

In response, the Petitioner has submitted the following vide its affidavit dated 4.8.2016:

> "I say that Adani Power has entered into agreement for supply of coal through AEL which has already been submitted before this Hon'ble Commission in January 2013.As observed by the Hon'ble Appellate Tribunal at Para 231 at Page 399 of the Full Bench Judgement dated7.4.2016 passed in Appeal No. 98 of 2014 and batch matters, Adani Power had entered into consolidated Coal Supply Agreement with AEL on 26.7.2010. Details as sought by the Hon'ble Commission are enclosed herewith as Annexure I."

62. The Petitioner vide its affidavit dated 4.8.2016 has placed on record the Consolidated Coal Supply Agreement dated 26.7.2010. Adani Global Pte Limited (AGPTE), a subsidiary company of Adani Enterprises Limited vide its letter dated 3.8.2016 has placed on record the Coal Supply Agreement dated 14.12.2009 between (AGPTE) and PT Dua Samudera Perkasa, a company in Indonesia having legal right to mine coal in Indonesia. Copies of the CSAs have been shared with the Respondents including Prayas.

63. Consolidated Coal Supply Agreement dated 26.7.2010 between Adani Enterprises Limited and Adani Power Limited pertains to supply of 10 MMTPA coal from Indonesia for Mundra Power Project of the Petitioner. In the recital of the Coal Supply Agreement dated 26.7.2010, the following has been stated:

> "WHEREAS the Purchaser is setting up a 4620 MW coal based power plant at Mundra in Kutch District of Gujarat and have entered into three Coal Supply Agreements dated 8.12.2006, 24.3.2008 and 15.4.2008 along with its

amendments, communication etc from time to time (herein after referred to as the CSAs) for the supply of Standard Coal from Designated Mines.

WHEREAS, PT Adani Global, a wholly owned subsidiary of the Supplier has entered into an agreement with holders of long-term exploitation license to exclusively mine coal in Bunyu Island, Indonesia, however, post execution of the $CSAs_t$ it was found that the quality and quantity of Standard Coal was not matching to the terms as agreed in the CSAs.

WHEREAS the Supplier through its subsidiaries (Adani Global PTE Ltd, PT Adani Global etc) have arranged to procure the coal from the other source in Indonesia (hereinafter referred to as the 'New Source') so that to supply the desired quantity and quality of coal as agreed in the CSAs.
WHEREAS the Supplier and the Purchaser have agreed to amend and consolidate the terms of the CSAs and replace the CSAs with this Agreement.

NOW THEREFORE the Purchaser has agreed to purchase the Standard Coal from the Supplier on the basis of the terms and conditions agreed in the present Agreement."

64. As per the above recital, the Petitioner had earlier entered into CSAs dated 8.12.2006, 24.3.2008 and 15.4.2008 with Adani Enterprises Limited for supply of standard coal from designated mines in Indonesia for which PT Adani Global, a wholly owned subsidiary of Adani Enterprises Limited, had entered into agreements with holders of long term exploitation licence to exclusively mine coal in Bunyu Island of Indonesia. As the quality and quantity of coal in mines in Bunyu Island of Indonesia was not matching with the terms agreed in the CSAs, Adani Enterprises Limited through its subsidiaries namely, Adani Global PTE Ltd and PT Adani Global, arranged coal from other sources in Indonesia in order to match with the desired quality and quantity of coal agreed in the CSAs. This necessitated execution of the Consolidated Coal Supply Agreement dated 26.7.2010 between Adani Power Limited and Adani

Enterprises Limited. Article 4.1.1 of the Consolidated CSA provides as under:

> "4.1.1 The Supplier represents and confirms that the Supplier has entered into arrangement for procurement of Contract Quantity of Standard Coal from the Designated Mines. The Supplier shall transport by vessel, deliver and sell to the Purchaser, and the Purchaser shall purchase, take delivery of, and pay for Contract Quantity of Standard Coal and of the quality determined in accordance with and subject to the terms of this Agreement."

As per the Agreement, Designated Mines has been defined as the "coal mines in Indonesia". Further, the said CSA provides for supply of 10 MMTPA of Standard Coal as firm quantity in each Contract Year and Optional Quantity limited to 5% of the Contract Capacity in each contract year and Excess Quantity of 0.850 MMTPA limited to 5% of the Contract Capacity. Contract Capacity has been defined as "the Firm Quantity and such other additional quantities of Standard Coal as required by the Purchaser and agreed in writing by the Supplier". Contract Period has been defined as "the period commencing on the Start Up Date and expiring 15 years after the Scheduled Commercial Operation Date of the last unit of Power Project- Phase IV, or such extended period as may be agreed to mutually between the parties hereto". The price of coal has been agreed in the Consolidated CSA as under:

> "Article 10: Price
>
> The unit price at which the Supplier shall sell and the Purchaser shall buy each Tonne of Contract Quantity of Standard Coal under this Agreement shall be as follows:
>
> 10.1 Delivered Price

The Delivered Price for Contract Quantity of Standard Coal supplied by the Supplier hereunder effective for the Contract Period shall be the CIF Price as inclusive of the freight and insurance costs.

10.2 CIF Price

Subject to the adjustment as per Article 10.6, the CIF Price shall be US Dollar 36 per metric tonne until 5 years from the Start-up Date and thereafter shall be increased by 10% in every block of 5 years for delivery of Contract Quantity of Standard Coal at Mundra port. The price of Contract Quantity of Standard Coal shall be with reference to a gross calorific value of 5,200 kCal/kg, as per this Agreement.

10.3 Adjustment to CIF Price

In case of variation in the specifications as per Schedule I, the price of Contract Quantity of Standard Coal shall be adjusted accordingly. For avoidance of doubt, the minimum price of coal will not be less than CIF price of 30 USD per MT and the maximum price of Coal will not be more than CIF price of 45 USD per MT such that the average price of the Coal will be CIF price of approximately USD 36 per MT with an average GCV of 5000 to 5200 kCal/kg.

10.4 The CIF Price for Contract Quantity of Standard Coal supplied by Supplier hereunder shall be inclusive of freight and insurance costs/charges.

10.5 Other charges

Except as specifically set out in this Agreement, all direct and indirect costs for the supply, delivery and transport of Contract Quantity of Standard Coal to the Port of Discharge (including all transportation, weighing, sampling, insurance, handling and mining cost and all taxes) shall be borne exclusively by the Supplier."

65. As regards the arrangement of coal in Indonesia by the subsidiary company of Adani Enterprises Limited, AGPTE has submitted a Coal Supply Agreement dated 14.12.2009 between Adani Global Pte Limited and PT Samudera Perkasa. The Petitioner vide its affidavit dated 10.10.2016 has submitted that the said document submitted by AGPTE be treated as part of the documents submitted by the Petitioner. As per the said CSA, PT Dua Perkesa (the Seller) is a limited liability company

organised under the laws of Indonesia and has the legal rights to mine coals in the mines situated in South Kalimantan, Indonesia. PT Adani Global (the Buyer) is a trading/mining company engaged in the business of trading of coal and intended to purchase coal from the Seller. As per the said CSA, "the Seller has agreed to sell and deliver and the Buyer has agreed to take delivery of coal as per the terms and conditions set out in the Agreement." As per the CSA, the source of coal would be the recoverable reserve from PT Radhliya Bara Moya and PT Berkat BanuaInti, and in case of shortfall from the designated mines, the Seller may supply from any source other than the designated mines. The minimum quantity of coal to be purchased by the Buyer from the Seller is 10 MMTPA, unless excused by force majeure or as agreed by the Seller in writing. Article 10 of the CSA deals with the price of coal which is extracted as under:

> "10.1 Delivered Price. Subject to Section 10.5, the Delivered Price for Coal supplied by the Seller throughout the term shall be the CIF Price which shall be the sum of the FOBT Price (as adjusted) and the Freight and Insurance Cost.
>
> For the benefit of invoicing, the FOBT Price of any shipment shall be calculated as of the data when such shipment is scheduled to leave the Loading Port as per the quarterly delivery and shipping schedule as agreed in Article 6.3, regardless of the actual date when such shipment has left the Loading Port.
>
> 10.2 FOBT Price. The FOBT Price for coal supplied by the seller hereunder for the first 5 delivery years shall be US$ 28 per metric tonne of coal FOBT and shall be referenced to a Gross Calorific Value of 5200 kcal/kg GAR, ash content of 5.0% and sulphur content of 0.7%.

10.5 CIF Price limits. Notwithstanding anything contained in this Agreement, the CIF Price for Coal supplied under this Agreement shall at no time be less than US$ 30/MT or more than US$ 35/ MT."

Vide Amendment No. 1 dated 15.1.2010, Article 10.2and 10.5 of the CSA dated 14.12.2009 has been modified as under:-

"10.2 FOBT Price: The FOBT Price for coal supplied by the seller for coal supplied by the seller hereunder for the first 5 delivery years shall be US$25 per metric tonnes of coal FOBT and thereafter shall be increased by 10% in every block of 5 years for delivery of quantity of coal referenced to a Gross Calorific Value of 5200 kcal/kg GAR, ash content 5% and sulphur content of 0.7%.

10.5 CIF Price Limits: Deleted."

66. From the above provisions, it emerges that PT Adani Global which is a wholly owned subsidiary of Adani Enterprise Limited had entered into Agreements with the holders of Long Term Exploitation Licence to exclusively mine coal in Bunyu Island. As per the Recital, these agreements formed the basis of the Coal Supply Agreements dated 8.12.2006, 24.3.2008 and 15.4.2008. Since the coal available from Bunyu Mine was of inferior quality, AGPTE and PT Adani Global arranged to procure coal from other sources. The Petitioner has placed on record the CSA between Adani Global Pte and PT Dua Samudera Parkesa. However, the agreements, if any, between PT Adani Global and the mining companies in Indonesia have not been placed on record. On 26.7.2010, Adani Power Limited entered into a CSA with Adani Enterprise Limited by replacing all the earlier CSAs. It is also noticed that

PT Dua Samudera Parkesa in its agreement dated 14.12.2009 with Adani Global Pte Limited has committed to supply 10 MMTPA of coal. The consolidated Coal Supply Agreement dated 26.7.2010 also provides for the supply of 10 MMTPA of standard coal for each of the contract year for the contract period which is 15 years from the scheduled commercial operation date of last unit of Phase-IV of the Mundra Power Project of the Petitioner. As per the agreement dated 14.12.2009 as amended on 15.1.2010, the FOBT Price of coal is USD 25 per metric tonnes for first 5 years and shall be increased by 10% every block of 5 years. As per the CSA dated 26.7.2010, the CIF price shall be US$ 36 per metric tonne upto 5 years from the start of date and thereby shall be increased by 10% in every block of 5 years for delivery of contract quantity of standard coal at Mundra Port with reference to a cross calorific value of 5200 kcal/kg. According to the Petitioner, the FoB price of coal agreed to be supplied under the CSA dated 26.7.2010 was USD 25.7 per metric tonne and the freight and insurance cost as USD 10.3 per metric tonne. It is therefore apparent that the coal price in the Coal Supply Agreement dated 26.7.2010 between Adani Power and Adani Enterprise Limited broadly corresponds to the Coal Supply Agreement dated 14.12.2009 between Adani Global Pte Limited and PT Dua Samudera Parkesa.

67. GUVNL vide its affidavit dated 25.10.2016 has submitted that in the CSA dated 26.7.2010, the CIF price of coal supplied in first 5 years will be USD 36/tonne for coal having GCV 5200 Kcal/kg whereas the Petitioner has submitted to the Commission the FoB price of USD 25.7/Tonne for force majeure implication. GUVNL has requested the Commission to carry out prudence check for determining the FoB price of coal.

68. Prayas has submitted that the consolidated CSA dated 26.7.2010 is for import of coal from new sources for the coal of higher GCV of 5000 to 5500 Kcal/Kg and these new sources have been finalised by Adani Power and Adani Enterprises Limited in the year 2010, in view of the poor quality of coal which was available from the sources covered by the then existing arrangements of Adani Enterprises Limited for procuring coal. According to Prayas, by the time the CSA dated 26.7.2010 was executed between Adani Power and AEL, the Government of Indonesia had already stipulated that there would be Regulations providing for the benchmark price as a mandatory pricing for export of coal from Indonesia. Prayas has argued that the promulgation of the Indonesian Regulations providing for the benchmark price was a fully anticipated event at the time of the signing of the consolidated CSA dated 26.7.2010 and there was nothing unforeseen or unanticipated about this event,

which is an essential feature to constitute force majeure. Prayas has submitted that fixation of benchmark price by the Government of Indonesia for export of coal by coal companies is traceable to Articles 4 and 5 of the Mining Law No. IV dated 12.1.2009. Subsequently, the Government of Indonesia issued Regulation 23 of 2010 dated 1.2.2010 containing several enabling provisions with regard to the control of production and sale of coal including export of coal to be guided by the coal benchmark price as stipulated by the Ministry of Energy and Mineral Resources (MEMR). On 23.9.2010 the Minister issued the Regulation 27 of 2010 setting forth the stipulation of coal benchmark price to be issued by MEMR which would be given effect from 23.9.2011 in pursuance of Regulation 23 of 2010 dated 1.2.2010. Prayas has submitted that since the new sources in Indonesia have been identified after the decision by Government of Indonesia to regulate the export price of coal as per the Regulation dated 1.2.2010, CSA dated 26.7.2010 cannot be said to be affected by Indonesian Regulations. According to Prayas, if the Petitioner is relying on consolidated CSA dated 26.7.2010 as the sole basis for sourcing of coal supply and relief for consequence of promulgation of Indonesian Regulations, the claim of the Petitioner is liable to be rejected. Prayas has submitted that the arrangement between Adani Global Pte with its own subsidiaries (subsidiaries of Adani Group) and the agreement dated 14.12.2009

between Adani Global Pte and PT Dua Samudera Parkesa can only be subject matter of consideration for grant of relief to the Petitioner. Prayas has submitted that as per the Full Bench Judgment, the effects of the force majeure have to be considered only to the extent the ability of Adani Power to procure coal from Indonesia through Adani Global Pte Ltd. at reduced/negotiated price under the definite CSA existing prior to Indonesian Regulations which stood marginalised on account of Indonesian Regulations. Prayas has submitted that as per the documents made available by Adani Global Pte, there has been no import of coal from PT Dua Samudera Parkesa pursuant to the CSA dated 14.12.2009 and the imports are from other sources namely, the low GCV Coal of 3000 kcal/kg from Bunyu Mine, East Kalimatan or from third parties mainly, PT Kaltim (KPC), Kowa Company, LG etc. Prayas has argued that since there is no CSA between Adani Global Pte with any of these companies from where the import has been made till 1.2.2010, there cannot be any consideration of the quantum of coal imported from these other companies for the purpose of considering the implication of force majeure. Prayas has further submitted that CSA dated 14.12.2009 between Adani Global Pte and PT Dua Samudera Parkesa is not to be considered for force majeure for the reason that there is no import of coal under this Agreement from Indonesia and the agreement provided in Article 10.3 for adjustment of coal prices to

international market prices after a period of 5 years. Prayas has further submitted that in the circumstances, the zone of consideration in pursuance to the decision of the Appellate Tribunal is restricted to that quantum of coal, which has been procured by Adani Power with reference to CSAs dated 8.12.2006, 24.3.2008 and 15.4.2008 as amended prior to Indonesian Mining Regulations mentioned above and provided those sources other than the New Sources were not abandoned by the Consolidated CSA. Prayas has urged that the Petitioner should give the details of the import of such coal from Indonesia under the said CSAs dated 8.12.2006, 24.3.2008 and 15.4.2008 with full particulars of GCV, FoB prices and benchmark prices, as a pre-condition for any consideration of the quantum that could be said to be affected by force majeure event. Prayas has further submitted that in so far as the underlying agreement from Indonesia is concerned, the coal imported from such of the Indonesian Companies with which the Adani Power Pte had agreement prior to 12.1.2009 or 1.2.2010 can only be subject matter of consideration.

69. The Petitioner has submitted that Prayas is raising the issues which have already been adjudicated by the Appellate Tribunal in the Full Bench Judgment dated 7.4.2016. The Petitioner has further submitted that Prayas moved a clarification application before the

Appellate Tribunal seeking clarification on the extent of consideration of impact of Indonesian Regulations vis-a-vis coal required to be imported under Coal Supply Agreement prior to Indonesian Regulations and also the availability of domestic coal from Mahanadi Coalfield Limited. The said application has been dismissed by order date 11.5.2016 and accordingly, Prayas cannot raise the same issue as it is barred by *res judicata*. The Petitioner has further submitted that since the supply of coal under Coal Supply Agreement dated 26.10.2010 has been affected by Indonesian Regulations, the corresponding FoB price based on CSA dated 26.7.2010 is required to be considered as base for the purpose of assessing the impact of promulgation of Indonesian Regulations.

70. We have considered the submissions of Petitioner, Respondents and Prayas. The Appellate Tribunal in Paras 207, 208, 221, 231 and 295 has observed as under:-

> "207. Adani Power's MoU dated 21/12/2006 with the Kowa Company Limited of Japan was terminated on 5/2/2008 and its MoU dated 9/9/2006 with Coal Orbis Trading GMBH of Germany was terminated on 18/3/2008.
>
> 208. On 24/3/2008, Adani Power executed CSA with AEL for supply of imported coal for Mundra Phase-III power project for 15 years. This is evident from the Directors' Report and Annual Report as well as Prospectus submitted by Adani Power to SEBI on 5/8/2009."
>
> "221. After termination of AEL's MoUs with the Kowa Company Limited of Japan and with Coal Orbis Trading GMBH of Germany, on 15/4/2008, Adani Power executed FSA with AEL, which has back to back arrangement with the mining companies in Indonesia for supply of imported coal."

"231. On 26/7/2010, AEL entered into a consolidated CSA with Adani Power 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 CSA provided for supply of 10 MMT of coal per annum at CIF USD 36/MT for a period of 15 years from the scheduled COD of last unit of Phase IV of the project."

"295. .....It must be noted that the generators had entered into a long term contract of 25 years with the procurers. Adani Power and CGPL had negotiated agreement for supply of Indonesian Coal. Promulgation of the Indonesian Regulation was a totally unexpected and drastic event. The Indonesian Regulation is also extremely harsh in nature. 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 minerals and coals by referring to the benchmark price either for domestic sales or exports, including to its affiliated business entities.....In the cases of Adani Power and CGPL, the promulgation of Indonesian Regulation was not known to them even when the PPA was executed. Promulgation of Indonesian Regulations obliterated the negotiated coal price agreed between generators and coal supplier."

From the above extracted excerpts of the Full Bench Judgment, it is noticed that the Appellate Tribunal has taken note of the fact that the Petitioner had entered into CSAs dated 24.3.2008 and 15.4.2008 with Adani Enterprises Limited which had back to back arrangement with the coal mining companies in Indonesia for supply of imported coal. Further, the Consolidated CSA dated 26.7.2010 replaced the FSAs dated 24.3.2008 and 15.4.2008 for supply of coal at the CIF price of USD 36 per Tonne. One of the Recitals of the Consolidated CSA dated 26.7.2010 clearly mentions that Adani Enterprises Limited through its wholly owned subsidiaries PT Adani Global and Adani Global PTE Limited have arranged coal from other sources in Indonesia. The Appellate Tribunal has held that promulgation of Indonesian Regulations obliterated the negotiated coal price agreed between generators and

coal supplier. The Appellate Tribunal has noticed that as per the Indonesian Regulations, the existing direct sale contracts and term sale contracts shall adjust to the regulation within a period of not later than 6 months and12 months respectively. Based on the facts of the case and the observations/findings of the Appellate Tribunal, we are of the view that since the Indonesian Regulations affect the sale of coal by Coal Mining Companies in Indonesia through the CSAs entered prior to the date of the promulgation, the basis for consideration of relief on account of force majeure shall be the CSAs entered into by the Petitioner at negotiated price with the Mining Companies in Indonesia either directly or through any intermediary companies. The Petitioner is importing coal from Indonesia through Adani Enterprises Limited which is evident from the invoices of imported coal submitted by the Petitioner. In our view, CSA dated 26.7.2010 between Adani Power Ltd. and Adani Enterprise Ltd. and the CSA dated 14.12.2009 along with the Amendment dated 15.1.2010 between Adani Global Pte Ltd and PT Dua Samudera Parkesa Ltd. are contractual documents governing the import of coal by the Petitioner for supply of power to GUVNL and Haryana Utilities and need to be considered for working out the relief.

71. Prayas has submitted that since the Indonesian Regulations providing for fixation of benchmark price by the Government of

Indonesia for export of coal by the coal companies is traceable to Article 4 and 5 of the Mining Laws dated 12.1.2009, it was within the knowledge of the Petitioner that Indonesian Government would regulate the export. Prayas has further submitted that Govt. of Indonesia issued Regulation No. 23 of 2010 dated 1.2.2010 containing several enabling provisions with regard to the control of production and control of sale of coal including the export of coal to be guided by the coal benchmark price as stipulated by Minister of Energy and Mineral Resources. According to Prayas, the regulation was anticipated right from 1.2.2010 if not 12.1.2009 and therefore, the CSA dated 26.7.2010 cannot be the basis for sourcing the coal supply and relief on account of Indonesian Regulations. We have perused the Articles 4 and 5 of Law No. 4/2009. The said articles talk about the control of the mineral and coal and their production and exports by the State in national interest. There is no indication in the said articles that the price of coal shall be referenced to the international benchmark price. Regulation No. 23 of 2010 dated 1.2.2010 enabled the Minister of Energy and Mineral Resources to determine the benchmark prices by market mechanism and/or following prices generally prevailing on the international markets. Subsequently, the Indonesian Regulations were notified on 23.9.2010 making it mandatory for the coal companies in Indonesia to sell coal at the benchmark price. From the sequence of events, it is noticed that the

concept of benchmark price of coal was first mooted in the Regulation 23 of 2010 dated 1.2.2010. The Petitioner had entered into CSAs dated 24.3.2008 and 15.4.2008 with Adani Enterprises Limited which were prior to notification of Regulation No. 23 of 2010 dated 1.2.2010. Further, the consolidated CSA dated 26.7.2010 replaced the CSAs dated 24.3.2008 and 15.4.2008 while retaining the same terms and conditions. Further, consolidated CSA dated 26.72010 between the Petitioner with Adani Enterprise Ltd had reference to the CSAs entered into by Adani Global Pte Ltd with coal mining companies in Indonesia. One of the CSA placed on record is the CSA dated 14.12.2009 between Adani Global Pte with PT Dua Samudera Parkesa for supply of 10 MM TPA of coal for Mundra Power Project of the Petitioner at a FoB price of USD 28 per metric tonne for the first 5 delivery years with reference to the GCV of 5200 Kcal/Kg. By amendment dated 15.1.2010, the FoB price has been agreed as USD 25 per metric tonne for the first 5 years and thereafter to be increased by 10% in every block of 5 years with reference to the GCV of 5200 Kcal/Kg. This CSA is prior to the notification of the Regulation No. 23 of 2010 dated 1.2.2010 and notification of the Indonesian Regulations dated 23.9.2010. We are of the view that the Petitioner could not have the prior knowledge of the Indonesian Regulations at the time when the Petitioner entered into CSAs dated 24.3.2008 and 15.4.2008 with Adani Enterprises Limited or when Adani Global Pte Ltd,

the wholly owned subsidiary of Adani Enterprises Limited, entered into a Coal Supply Agreement dated 14.12.2009 with PT Dua Samudera Parkesa, the Coal Mining Companies in Indonesia.

72. Prayas has further submitted that since no coal has been imported from PT Dua Samudera Parkesa pursuant to the CSA dated 14.12.2009, the relief for force majeure shall not be admissible to the Petitioner. The Appellate Tribunal has taken note of the fact that the Petitioner had entered into CSA dated 26.7.2010 with Adani Enterprises Limited for 10 MMTPA coal to the Petitioner at the negotiated CIF price of USD 36/Tonne. What is affected in the CSA on account of Indonesian Regulations is the coal price which is aligned to benchmark price. After promulgation of the Indonesian Regulations, both spot sale and long term sale of coal have been aligned to the benchmark price. Therefore, any person buying coal from Indonesia after 23.9.2011 is required to pay the same price for long term purchase as well as spot purchase. We are of the view that the relief to the Petitioner should be based on the difference between the FoB price agreed in the CSA dated 26.7.2010 and the FoB price at which the Petitioner is purchasing coal from Indonesia or the HBA price whichever is lower. The CSA dated 26.7.2010 only provides for CIF price of USD 36/Tonne and FoB price has not been indicated. However in the CSA dated 14.12.2009 as

amended on 15.1.2010, FoB price of USD 25/Tonne has been indicated. The Petitioner in Annexure II to its affidavit dated 4.8.2006 as stated that it had assumed FoB price of USD 26/Tonne for imported coal. In the calculation submitted vide the affidavit dated 11.5.2016, the Petitioner has used USD 25.7/Tonne as FoB price. We are inclined to consider USD 25.7/Tonne as the base FoB price for 5200 kCal/kg for the purpose of determining the relief. The Petitioner has purchased coal on a few occasions from sources other than Indonesia. We are of the view that since the Indonesian Regulations affects the supply of coal from Indonesia only, the benefit of force majeure for import of coal from countries outside Indonesia cannot be considered for the purpose of relief.

IV. Coal Supply Agreement regarding domestic coal

73. Phase-IV of Mundra TPS has three units of 660 MW each and the Petitioner has entered into PPAs dated 7.8.2008 with Haryana Utilities for supply of 1424 MW power. The Petitioner has entered into a Fuel Supply Agreement with Mahanadi Coalfields Ltd. (MCL) for supply of Annual Contracted Quantity (ACQ) of 6.41 MTPA of Domestic Coal for 1386 MW (70% of gross capacity of Units 7, 8 and 9 i.e. 1980 MW). The Petitioner has submitted that the capacity contracted under the PPAs with Haryana Utilities is 1424 MW at the periphery of Haryana State.

The Petitioner has submitted the ACQ corresponding to 70% of 1424 MW of Contracted Capacity as under:

Gross Capacity based on linkage (MW) (70% of 1980 MW)	A	1386
Aux Consumption (%)	B	6.5%
Transmission Loss (%)	C	4%
Net Capacity at Haryana Periphery (MW)	D = A * (1-B) * (1-C)	1244
MCL ACQ (MTPA)	E	6.41
Contracted Capacity of Haryana Discoms based on coal linkage (70% of 1424 MW)	F = 1424 * 70%	996.8
MCL ACQ for Haryana PA (MTPA)	G = E * F/D	5.13

The Petitioner has submitted that to work out shortfall of domestic coal, coal supplied by MCL will be allocated against Haryana PPAs, in accordance with affidavit dated 8.5.2015 filed by the Petitioner before Appellate Tribunal. The Petitioner has submitted that entire scheduled energy above normative availability of domestic coal will be based on imported/alternate coal supplies and will be paid accordingly.

74. Prayas has submitted that the claim made by the Petitioner to the effect that the bid under the PPAs dated 7.8.2008 was premised on the blending of coal of 70% domestic and 30% imported is misplaced. Prayas has submitted that the FSA dated 9.6.2012 with MCL provides for the supply of 6.405 MMTPA of 'F' Grade coal for generation of 70% of the installed capacity of 1980 MW (3 x 600 MW) which works out to 1386 MW. The assured quantum of coal is 80% of 6.405 MTPA which works out to 5.125 MTPA, which is capable of generating 1109 MW of

power. The contracted capacity of the Haryana Utilities is 1424 MW. Considering the targeted PLF at 80%, the contracted capacity works out to 1139 MW. The quantum of coal available from MCL at the assured quantum of 5.125 MTPA is sufficient for generation and supply of power to Haryana Utilities and there is no shortage of domestic coal necessitating the import of coal from Indonesia. Prayas has relied upon a letter dated 30.6.2009 which was written by Adani Power to Adani Enterprises Ltd requesting the latter to reduce the quantum of imported coal in view of the coal linkage of 6.409 MMTPA, the submission of the Petitioner before the Appellate Tribunal vide its affidavit dated 8.5.2015, and the minutes of the RCCC meeting held with the coal companies on 27.6.2013 in support of its submission that the coal supplied by Mahanadi Coalfield Ltd. is sufficient to meet the supply of contracted capacity to Haryana Utilities.

75. The Petitioner has submitted that the force majeure in case of the Petitioner has been held for shortfall in domestic coal and increase in imported coal on account of Indonesian Regulations. The Petitioner has submitted that since both force majeure events are distinct and applicable for separate quantum of coal i.e. domestic coal shortfall for 70% of capacity and increase in imported coal price for 30% of capacity, there has to be separate and corresponding relief addressing the cause

of force majeure events. The Petitioner has submitted that the Petitioner has proposed the cost of supplying electric by using alternate coal (Indonesian Coal) procured/to be procured to meet the shortfall in domestic coal in line with the approved methodology in order dated 3.2.2016 in Petition No.79/MP/2013. The Petitioner has submitted that in terms of Adani Power's affidavit dated 8.5.2015 before the Appellate Tribunal, the Petitioner has considered and will consider entire domestic coal received from Mahanadi Coalfields Ltd. under Fuel Supply Agreement dated 9.6.2012 towards power supplied to Haryana Utilities under PPAs dated 7.8.2008 till the time Adani Power enters into long term PPA with regard to balance capacity or till Government of India permits use of linkage coal towards supply on short term or medium term. The Petitioner has further submitted that under the relief proposed by the Petitioner, the cost of supplying electricity by using alternate coal (Indonesian Coal) procured to meet the shortfall is being compared with the energy charge under the PPAs and if the quoted energy charge is adequate for meeting the additional cost of generation due to shortage of domestic coal, then the Petitioner will not claim any relief.

76. We have considered the submission of the Petitioner and the Respondents. The Appellate Tribunal in the Full Bench Judgment dealt with the shortfall of domestic coal as under:

"276. So far as PPAs with Haryana Utilities are concerned, we may have to restate certain facts. The bid was submitted by Adani Power on 24/11/2007 offering a total Contracted Capacity of 1424 MW from the Mundra Power Plant at a levelised tariff of Rs. 2.94 per Unit. The bid of Adani Power was based on blend of domestic and imported coal in the ratio of 70:30. The New Coal Distribution Policy dated 18/10/2007 notified by the GoI assured that 100% of the quantity, as per normative requirement of the IPPs would be considered for supply of coal through FSA by CIL. However, on 12/11/2008, New Coal Distribution Policy was amended in SLC (LT) meeting to restrict coal linkage to coastal power plants to 70% of their capacity. On 25/06/2009, Letter of Assurance issued by Mahanadi Coal Fields Ltd. for supply of 70% of the coal required for Unit 7, 8 and 9 for Mundra Power Plant. On 09/06/2012, on the basis of draft FSA issued by Ministry of Coal, FSA was executed between Adani Power and Mahanadi Coal Fields, in terms of new draft FSA dated 19/04/2012 issued by CIL. In terms of FSA, Mahanadi Coal Fields was to supply coal of 6.405 MTPA. This quantity of 6.405 MTPA corresponds to 70% of coal required for generation of 1980 MW power. However, Mahanadi Coal Fields vide its letter dated 2/6/2012 stated that due to shortage of coal, it would supply only 80% of the 70% coal linkage. Adani Power did not get the assured quantity under the coal linkage because of the amendment in the New Coal Distribution Policy which had adversely impacted its viability. We may note that there is some dispute between Adani Power and the procurers/Prayas as to what percentage of coal Adani Power had to import from Indonesia. Prayas referred to Schedule VII to the FSA dated 9/6/2012 with Mahanadi Coalfields Limited contemplating supply of domestic coal upto 70% of 1980 MW, i.e., 1386 MW, of which assured quantum is for 80% of the 70% (1386) i.e., 1109 MW. The real effect of Schedule VII, according to Prayas is that out of the ACQ of 6.405 MTPA (covering 1386 MW), 80% is available from domestic sources and the balance 20% was offered by CIL through imports in case of shortfall. According to Prayas, there was availability of domestic coal of 5.124 MTPA covering 1109 MW. This is disputed by Adani Power. According to Adani Power, it is getting linkage of domestic coal to the extent of 42% of the installed capacity. According to Prayas, Adani Power is getting much more than 42%. It is not necessary for us to go into this aspect at this stage because one thing is certain that Adani Power was constrained to generate electricity by procuring substantial quantity of imported coal from Indonesia due to shortage of domestic coal availability....."

77. The Appellate Tribunal has recorded that the bid of Adani Power was based on blend of domestic and imported coal in the ratio of 70:30. Further, the Appellate Tribunal has come to the conclusion that the Petitioner was constrained to generate electricity by procuring substantial quantity of imported coal from Indonesia due to shortage of

coal availability from Mahanadi Coalfield Ltd. The Appellate Tribunal has not dealt with the dispute whether the Petitioner was getting coal to the extent of 42% installed capacity as claimed by the Petitioner or 5.124 MMTPA covering 1109 MW as claimed by Prayas. Since the Commission has been directed to grant relief for force majeure on account of Indonesian Regulations and non-availability/short supply of domestic coal, the Commission is required to determine to what extent the Petitioner was affected on account of non-availability/short supply of domestic coal for the purpose of working out the relief.

78. The Petitioner has placed on record the copy of the FSA dated 9.6.2012 with Mahanadi Coalfield Limited. As per Schedule 1 of the FSA, the annual contracted quantity of coal is 6.405 MMTPA for meeting the requirement of 70% of the installed capacity i.e. 70% of 1980 MW = 1386 MW. Further, vide Schedule 7of the FSA which is a MoU between Mahanadi Coalfield Ltd and the Petitioner, quantum of supply of domestic coal under the FSA would be limited to 80% of the annual contracted quantity for the year 2012-13 which is subject to review by the Mahanadi Coalfield Ltd every year. In other words, the Petitioner was entitled to receive only 80% of the annual contracted capacity of 6.405 MMTPA which works out to 5.124 MMTPA. This quantity is subject to revision during the subsequent years. According to Prayas,

this quantity is sufficient to meet the contractual obligation for supply of power under the PPAs with Haryana Utilities i.e. 80% of 1424 MW which works out to 1109 MW. The Petitioner has contested the above submissions of Prayas. According to the Petitioner, it is required to deliver 1424 MW at Haryana periphery which means that the delivery quantum is net of auxiliary consumption and transmission losses. The Petitioner has given 6.5% as auxiliary consumption in the bid assumption. The Petitioner has taken the transmission losses for the month of March 2016 as 4.33%. After taking into consideration the auxiliary consumption and transmission losses, the Petitioner has to generate 1592 MW to supply 1424 MW capacity to Haryana Utilities at Haryana periphery. 80% of 1592 MW works out to 1274 MW as against 1109 MW as per the submission of Prayas. Further, the Procurers have the first right on the capacity generated over and above 80% subject to availability declaration by the Haryana Utilities. With the availability of 5.13 MMTPA of coal from Mahanadi Coalfield Limited, the Petitioner can generate 885 MW power considering the GCV of 3370 kCal/kg and SHR of 2230 kCal/kWh which works out 69.46% of 1274 MW and 55.48% of 1592 MW. Therefore, we are not in agreement with Prayas that with the coal available from Mahanadi Coalfield Ltd, the Petitioner would be able to generate 80.64% of the contracted capacity.

79. The Petitioner in its affidavit dated 23.9.2016 has submitted as under:

> "53……It is submitted, in terms of Adani Power's Affidavit dated 8.5.2015, Adani Power has considered and will consider entire domestic coal received from Mahanadi Coalfields Ltd. under Fuel Supply Agreement dated 09.06.2012 towards power supplied to Haryana Utilities under PPAs dated 07.08.2008 till the time Adani Power enters into long term PPAs dated 07.08.2008 till the time Adani Power enters into long term PPA with regard to balance capacity or till Government of India permits use of linkage coal towards supply on short term or medium term. As per the affidavit, Adani Power undertook to consider the entire coal received from Mahanadi Coalfields Ltd. towards supply to Haryana till Adani Power enters into long term PPA to supply from balance capacity or Government of India changes its policy."

80. In view of the categorical submission of the Petitioner that the entire coal received from Mahanadi Coalfields has been and will be considered for supply of power to Haryana Utilities till the Petitioner enters into long term PPA for the balance capacity, it no more remains a bone of contention whether the coal received from Mahanadi Coalfields is sufficient for generation and supply of power to the Haryana Utilities or not. For the past period, the actual data regarding the quantum of coal by Mahanadi Coalfields will have to be considered to find out the shortfall of coal which was imported to meet the contractual obligations. The Petitioner was directed to submit the actual availability of coal from Mahanadi Coalfield Ltd on Format IV of the RoP dated 15.7.2016. The Petitioner had submitted the required information on Format IV vide in Annexure-XI of its affidavit dated 4.8.2016 (Pg 173 & 174). Based on

the information submitted, the summary of the coal supplied by MCL and the coal consumed for supplying the contracted capacity to the Haryana Utilities has been worked out as under:-

Year	Coal Quantity entitled under FSA (By Rail) (Million Ton)	Coal Quantity offered by CIL (By Rail) (Million Ton)	Coal Quantity Indented by APL (Million Ton)	Coal Quantity received from CIL (Million Ton)	GCV of Coal received (as per Bill of lading) kCal/kg	% of coal received w.r.t. Coal allocation of 6.405 Million Ton	% of coal received w.r.t. Coal allocation of 5.13 Million Ton
2012-13	3.793	3.804	3.804	2.237	3,254	34.93	43.60%
2013-14	5.204	5.208	5.208	2.720	3,360	42.47	53.02%
2014-15	5.124	5.018	5.018	4.077	3,377	63.65	79.47%
2015-16	5.304	5.326	5.326	4.990	3,380	77.90	97.27%

It is noticed that the supply of coal by MCL to the Petitioner falls short of the quantum of coal required (5.13 MMTPA) for generation and supply of electricity corresponding to 70% of the 1424 MW contracted capacity with Haryana Utilities. Therefore, the actual shortfall in the supply of the domestic coal was met by import of the coal from Indonesia. Taking note of the affidavit dated 8.5.2015 filed by the Petitioner before the Appellate Tribunal, we are of the view that the actual quantum of coal received by the Petitioner from Mahanadi Coalfield Limited for the past period and for the future period would be considered for meeting the contracted capacity and scheduled energy under the PPAs with Haryana Utilities, till the time balance capacity is

tied up. After the balance capacity is tied up through PPAs, the Petitioner shall approach the Commission with an appropriate application with the details of the new PPAs and allocation of additional quantum of coal if any and other relevant information for appropriate directions.

V. Adjustment of Profit from mines owned by the Petitioner or its Group Companies in Indonesia

81. The Petitioner has submitted that though there was no reference in the Judgment of the Appellate Tribunal dated 7.4.2016 for adjustment of mining profit, the Petitioner as a goodwill gesture and as a fair and prudent entity has proposed that increase in mining profit of the Bunyu mine owned by AEL in Indonesia pursuant to Indonesian Regulations be adjusted against the relief to be granted to the Petitioner.

82. The Petitioner has further submitted that though it was originally planned to source imported coal from Bunyu mine in Indonesia, on discovery of the fact that coal quality from Bunyu mine is not suitable for use at the Mundra Power Project, Adani Enterprises Limited tied up the coal supplies from other coal mining companies, namely PT Dua Samudera for supply of 5200 Kcal/kg of coal. The Petitioner has submitted that Bunyu mines produce around 3.5 to 5.0 MMTPA coal with the GCV of 3000 kCal/kg which is being used by the Petitioner for

blending purpose. The Petitioner has suggested that the incremental profit from the Bunyu mines for the coal actually being used at Mundra Power Project should be worked as the difference of current HBA/Market price for Bunyu and FOB price of the AEL contract (i.e.25.7 USD/MT for 5200 kCal/kg) duly adjusted for Bunyu quality. The Petitioner has submitted that there are various Indonesian Government taxes and levies applicable till the mining profit of Indonesian coal is repatriated to India. The Petitioner has proposed that the additional profit from Bunyu mines, net of such taxes and levies be adjusted against relief of force majeure on account of increase in coal prices due to Indonesian Regulations. The Petitioner has submitted the following formula for working out the profit from Bunyu mines with reference to Gujarat PPA:

Parameters	Unit	Formula	March, 2016
Consumption of Bunyu for Bid 2 PPA of GUVNL	MT	A	0.11
Contractual FoB price, adjusted for Bunyu quality	USD/MT	B=25.7*3000/5200	14.83
Actual Price of Bunyu post Indonesian Regulations	USD/MT	C	15.40
Incremental Profit of Bunyu mines due to Indonesian Regulations	USD/MT	D=C-B	0.57
	MUSD	E=D*A	0.063
% Taxes & Duties payable till repatriation of incremental coal mine profit to India*	%	F	52.38%
Actual Exchange Rate	Rs/USD	G	67.02
Net Profit of Bunyu Mine to be adjusted from Relief of Force Majeure**	Rs Cr	H=[E*(1-F)*G]/10	0.20

* Rate of Tax shall be applicable from time to time

** In case of incremental profit being negative, the amount proposed to be adjusted is Nil in the particular month and will be carried forward for adjustment.

The Petitioner has submitted the following formula for working out the profit from Bunyu mines with reference to Haryana PPA:

Parameters	Unit	Formula	March, 2016
Consumption of Bunyu for Haryana PPA	MT	A	0.18
Contractual FoB price, adjusted for Bunyu quality	USD/MT	B=25.7*3000/5200	14.83
Actual Price of Bunyu post Indonesian Regulations	USD/MT	C	15.40
Incremental Profit of Bunyu mines due to Indonesian Regulations	USD/MT	D=C-B	0.57
	MUSD	E=D*A	0.10
% Taxes & Duties payable till repatriation of incremental coal mine profit to India*	%	F	52.38%
Actual Exchange Rate	Rs/USD	G	67.02
Net Profit of Bunyu Mine to be adjusted from Relief of Force Majeure**	Rs Cr	H=[E*(1-F)*G]/10	0.32

* Rate of Tax shall be applicable from time to time

** In case of incremental profit being negative, the amount proposed to be adjusted is Nil in the particular month and will be carried forward for adjustment.

83. We have considered the submission of the Petitioner. The sharing of incremental profit from Bunyu mines on account of the impact of Indonesian Regulations shall be determined on the basis of the methodology as under:

For Gujarat PPA

Parameters	Unit	Formula	Mar-16
Consumption of Buniyu under the PPA	MT	A	0.11
Contractual FoB price adjusted for Buniyu quality	USD/MT	B = 25.7 * (ratio of benchmark prices arrived at for buniyu GCV and 5200 for previous months based on Indonesian coal Indices)	8.90

Actual price of Buniyu post Indonesian Regulation	USD/MT	C	14.9
Incremental Profit of Buniyu Mine due to Indonesian Regulation	USD/MT	D = C – B	6.00
	MUSD	E = D * A	0.66
% Taxes & Duties payable till repatriation of incremental Indonesian coal mine profit to India*	%	F	52.38%
Exchange Rate[@] (to be applied based on workings principals given in para ___)	₹ / USD	G	58.74
Net Profit of Buniyu Mine to be adjusted from Relief of Force Majeure**	₹ Crs	H = [E * (1-F) * G] / 10	1.85

For Haryana PPA

Parameters	Unit	Formula	Mar-16
Consumption of Buniyu under the PPA	MT	A	0.18
Contractual FoB price adjusted for Buniyu quality	USD/MT	B = 25.7 * (ratio of benchmark prices arrived at for buniyu GCV and 5200 for previous months based on Indonesian coal Indices)	14.83
Actual price of Buniyu post Indonesian Regulation	USD/MT	C	15.4
Incremental Profit of Buniyu Mine due to Indonesian Regulation	USD/MT	D = C – B	0.57
	MUSD	E = D * A	0.10
% Taxes & Duties payable till repatriation of incremental Indonesian coal mine profit to India*	%	F	52.38%
Exchange Rate[@] (to be applied based on workings principals given in this order)	₹ / USD	G	52.65
Net Profit of Buniyu Mine to be adjusted from Relief of Force Majeure**	₹ Crs	H = [E * (1-F) * G] / 10	0.26

VI. Invoices of coal imported from Indonesia

84. The Petitioner was directed through the Record of Proceedings dated 15.7.2016 to submit the information of Formats I, II, and III. Format I pertains to the coal consumed during the months from various sources separately for Gujarat PPA and Haryana PPA. Format II pertains to the actual coal price paid for each consignment which includes the payments made to the Coal Supply Company by the Petitioner and the payment made by the Coal Supply Company to the Mining Companies in Indonesia. Format III pertained to the reconciliation of the coal used during the month source-wise. The Commission had also directed the Petitioner to submit the copy of Price Stores Ledger for the first month of the contract year, month of April for the Second Contract Year, month of September for third Contract Year and month of December for fourth Contract Year. The Petitioner has submitted the required information except Column 10 and 14 of Format II vide its affidavit dated 4.8.2016. AGPTE has submitted the information relating to Columns 10 and 14 and subsequently the Petitioner has taken ownership of the same.

85. On perusal of the information submitted by the Petitioner, it is noticed that the Petitioner has used the following categories of coal:

(a) Melawan Coal with GCV 5283 kCal/kg

(b) High GCV coal with 6445 Kcal/kg

(c) Indonesian Steam Coal-58 with 5742 kCal/kg

(d) Bunyu Mines with 3007 kCal/kg.

86. GUVNL has submitted that the information related to Column 13 of Format II regarding payment made to Coal Supply Company and the information related to Column 14 of the said format regarding payment made to the Coal Mining Company by the Coal Supply Company shows profit to the group company and has requested the Commission to carry out due diligence and prudence check while assessing the impact of force majeure. We have gone through the coal prices being paid by the Petitioner to AEL (Coal Supply Company) and that paid by Coal Supply Companies to the Mining Companies and find that the Petitioner's payment to AEL includes freight and other charges whereas such charges are not included in the price paid to the mining companies. After deducting the freight and other charges, the payments made by the Petitioner and the payment received by the mining companies broadly match for the same quality of coal. Haryana Utilities have suggested that actual price of imported coal should be allowed subject to maximum ceiling of relevant HBA price or any other relevant indices of source country from which coal is imported. Similar suggestions have also been made by GUVNL and Prayas. In our view, it is essential to ensure that the Petitioner procures coal efficiently and the end consumers are not

burdened with any additional cost of the coal above benchmark price of coal imported from Indonesia. In our view, the actual price of imported coal or the HB price of similar quality of coal whichever is lower should be taken into consideration while working out the relief. It is made clear that the Petitioner shall have to provide invoices for imported coal along with claims for relief as per above formula for each month.

87. During the hearing of Petition No.159/MP/2012, Learned Senior Counsel for MSEDCL raised issues regarding investigation initiated by DRI against the generating companies importing coal from Indonesia and over invoicing by the Generating companies. Learned Senior Counsel submitted a copy of the Circular of DRI No. SRI/HQ-CI/50S/Misc-33/2016-CI dated 30/31 March, 2016 advising the field offices of Customs to investigate into the instances of over-invoicing. In the said list, the names of Adani Power and Adani Enterprises have been mentioned. In our view, special agency like Directorate of Revenue Intelligence is invested with the task of investigating into this kind of allegation. If it is established that there has been any case of over-invoicing in the import of coal for use in Mundra Power Project of the Petitioner, DRI is requested to bring the same to the notice of the Commission. If any such case is brought to the notice of the Commission

by DRI, it will be open to the Commission to revisit the relief granted through this order.

VII. Operational Parameters for working out the relief

88. The Petitioner was also directed to furnish the (a) bid parameters and escalation factors considered in the bid tariff; and (b) the Guaranteed Design Parameters such as Heat Rate (Turbine Cycle Heat Rate and Boiler Efficiency), Auxiliary Energy consumption along with Heat Balance Diagram, any variation in the design parameters from the design parameters contended in the bid.

89. The Petitioner vide affidavit dated 4.8.2016 has furnished the copy of Thermodynamic Performance for steam turbine of Dongfang Turbine Co Ltd of May 2009 specifying guaranteed turbine cycle heat rate of 1885 kCal/kWh at rated conditions. However, rated conditions have not been specified. The petitioner has also submitted the copy of summary of thermal calculation output from Harbin Boiler Co Ltd of Sept 2006 specifying boiler efficiency of 85.24% at BMCR. However, the designed coal has not been specified and therefore, it cannot be said that whether this is for the GMDC coal or the Imported coal to be used in Mundra Plant.

90. The petitioner has submitted that the present petition is concerned with Phase-III consisting of two units of 660 MW each and Phase-IV consisting of three units of 660 MW each. The guaranteed design parameters for 660 MW units under rated conditions are as under:

(a) Guaranteed Turbine Cycle heat rate is 1885 kcal/kwh.

(b) Guaranteed Boiler efficiency on HHV basis is 85.30%.

(c) Guaranteed auxiliary power consumption of Units 5 & 6 is 7.08% and for Units 7, 8 & 9 is 8.92% (with 1.92% pertaining to FGD).

91. As regards the variations in design parameters, the petitioner has submitted as under:

(a) Station Hear Rate (SHR): SHR has been considered in the EPC Contract is 2210 kcal/kg without 6.5% allowance for site operating conditions (as per CERC Tariff Regulations) according to which the SHR works out to 2354 kcal/kWh. Secondly, the Petitioner considered SHR of 2230 kcal/kWh in the bid for first three years and heat rate degradation at 0.25% per annum for balance period of PPA. Accordingly, levelised SHR works out to 2257 kcal/kWhr which was used while quoting tariff considering domestic coal as source of coal. Thirdly, the Moisture content in domestic coal is around 10%-

12%, whereas moisture in the Indonesian Coal is around 33-35%. Use of coal with such high moisture deteriorates SHR as every percentage increase in moisture leads to increase of SHR to around 8 kcal/kWh. Fourthly, the Commission in the order dated 21.2.2014 has dealt with the issue of SHR and considered 2354 kcal/kWh. The Petitioner has submitted that after considering deterioration due to higher moisture in Indonesian Coal, gross SHR would be around 2390 kcal/kWh.

(b) Auxiliary Consumption: Auxiliary consumption considered in the bid is 6.5% considering the fact that all the auxiliaries do not run simultaneously. The Auxiliary loss under EPC contract is 7.08% and 7.00% (excluding FGD) for Unit 5 & 6 and Unit 7, 8 & 9 respectively which captures Auxiliary loss for all the equipment. The Commission has dealt with the issue of Auxiliary consumption considering factors affecting the same in the order dated 21.2.2014.

92. GUVNL has submitted that the petitioner is claiming and receiving reimbursement of clean energy cess from GUVNL based on GERC order dated 7.1.2013 on Change in Law wherein the Gross SHR of 2299.75 kcal/kWh (2150.27 kcal/kWh with auxiliary of 6.5%) has been

taken for calculating the impact of clean energy cess. The same parameter should be considered while assessing the impact of Force Majeure. Haryana Utilities have submitted that station heat rate shall be considered after ascertaining actual design heat rate and margin as per CERC Regulations issued from time to time.

93. The Commission has considered the submissions of the Petitioner and Respondents. Our decision on the bid parameters such as Station Heat Rate and Auxiliary Power Consumption are as under:-

(a) In the calculation submitted in the affidavit dated 11.5.2016, the Petitioner has considered Net Heat Rate (lower of actual or as per CERC Tariff Regulations) @ 2450 kCal/kg for Gujarat PPA and Net Heat Rate grossed up with transmission loss @ 2614 kCal/kWh in respect of Haryana PPAs. In the affidavit dated 4.8.2016, the Petitioner has submitted the bid assumption in which the Gross Station Heat Rate has been considered as 2230 kCal/kWh both for Gujarat PPA and Haryana PPAs. The Commission is not considering the effect of moisture content on Station heat rate as the Petitioner is using substantial quantity of high grade coal. In its additional affidavit dated 1.2.2013, the Petitioner had indicated the SHR of 2230 kCal/kWh for domestic

coal as well as for imported coal under Gujarat PPA as a fall back option. GUVNL has submitted that the Station Heat Rate approved by Gujarat Electricity Regulatory Commission (GERC) in the order dated 7.1.2013 in Petition No.1210 of 2012 should be considered for calculating the relief for force majeure. We have gone through the said order and noticed that the Petitioner had claimed Clean Energy Cess by considering Gross Station Heat Rate of 2150.28 kCal/kg and net Gross Station Heat Rate of 2324.62 kCal/kWh after accounting for the Auxiliary Power Consumption of 7.5%. GERC after considering the submission of GUVNL has allowed the Clean Energy Cess @ Rs.0.0221/kWh on the basis of the Station Heat Rate of 2150.27 kCal/kWh and auxiliary consumption of 6.5%. This order has not been challenged and the Petitioner has been claiming the relief for Change in Law on account of Clean Energy Cess on the basis of the said order. The Commission considers it appropriate to take the Gross Station Heat Rate of 2150.27 kCal/kWh for the purpose of calculating the relief in case of Gujarat PPA as well for the imported coal component under Haryana PPA. However, for the domestic coal component, Gross Station Heat Rate of 2230 kCal/kWh has been considered as per the bid assumption submitted by the Petitioner in its affidavits dated 1.2.2013 and 4.8.2016. In case of Haryana PPAs, SHR has

been taken as 2206 kCal/kWh considering the blending of domestic and imported coal in the ratio of 70:30.

(b) Auxiliary Power Consumption: In the proposed calculations for relief in respect of Gujarat PPA, the Petitioner has not separately calculated the Auxiliary Energy Consumption and the same is included in Net Heat Rate. In case of calculation of relief for Haryana PPA, the Petitioner has taken the Auxiliary Losses as 6.76%. However, in the bid assumptions, the Petitioner has considered 6.5% as Auxiliary Energy Consumption. We have considered the same rate for the purpose of Auxiliary Energy Consumption. The petitioner has claimed additional auxiliary consumption for FGD. Since, the claim for FGD is being considered by the Commission in Petition No. 156/MP/2014, the auxiliary consumption for FGD will be considered in the said petition.

VIII. Foreign Exchange Rate Variation

94. In the calculation for relief for incremental coal cost due to force majeure event, the Petitioner has considered the prevailing USD-INR exchange rate for the relevant month. Haryana Utilities have submitted that the risk of foreign exchange rate variation should lie with the generator and should not be passed on to the Procurers.

95. The Petitioner's claim for relief is on account of Indonesian Regulations which has been held to be an event of force majeure. The Petitioner had entered into CSA dated 26.7.2010 for import of coal for supplying the power to the Procurers under Gujarat PPA and Haryana PPAs. In terms of the said CSA, the Coal Price has been indicated in USD. On the other hand, the Petitioner has quoted the tariff in both Gujarat PPA and Haryana PPAs in INR. The Petitioner vide its affidavit dated 1.2.2013 had placed on record the bid assumptions in respect of Haryana PPAs and Gujarat PPA. As regards the exchange rates, the Petitioner had made the following submissions:

Gujarat PPA: Basis for bid tariff (imported coal as fall back as per techno-commercial feasibility:

(a) Dollar-Rupee Exchange Rate: 1 USD = ₹ 44.29 as on 2.1.2007

(b) Rupee Devaluation Rate: 1.07%

Haryana PPA: Basis for bid tariff (Imported coal component)

(c) Dollar-Rupee Exchange Rate: 1 USD = ₹ 39.70 as on 24.11.2007

(d) Rupee Dollar Exchange Rate : 1.07% (CERC notified escalation)

96. The Petitioner has assumed certain escalation rate for Rupee-Dollar exchange and thereby has taken the risk for any future exchange rate variations. The Petitioner has not claimed any exchange rate

variation on the Price of coal agreed in the CSA dated 26.7.2010. However, the Petitioner has claimed exchange rate variation on the incremental FoB cost of coal on account of Indonesian Regulations. The Appellate Tribunal has not given any directions with regard to exchange rate variation while directing the Commission to assess the impact of force majeure and grant relief to the Petitioner as admissible under the PPAs. The Commission is of the view that the exchange rate assumed by the Petitioner on the date of bid submission needs to be escalated by the exchange rate variation assumed in the bid till the date of commercial operation of Phase-III and Phase-IV units. Thereafter, the derived exchange rates would be escalated by percentage increase in exchange rate on calendar year basis based on CERC escalation indices. Accordingly, the Commission has allowed the escalation @ 1.07% on calendar year basis till the calendar year of COD of the respective first unit of Phase-III and Phase-IV of Mundra Power Project. Further, for the calendar year beyond COD, the escalation in exchange rate variation has been allowed based on 2012 calendar year as the base and changes thereafter have been allowed on calendar year to calendar year basis. For example, in the calendar year 2012 in case of Gujarat, PPA the rate so worked out is ₹46.71 against actual rate of 1 USD= ₹53.49. For the calendar year 2013, the actual exchange rate is 1 USD= ₹58.63 resulting in an increase of 9.62% over 2012 calendar

year. Hence, for working out the exchange rate variation for calendar year 2013, the derived rate would be ₹51.20/ 1 USD (₹46.71* 1.0962%).

97. The Exchange Rate as on CoD of the units covered under the respective PPAs by using the escalation rate assumed in the bid has been worked out as under:

Parameter	Formula	Gujarat	Haryana
Bid Deadline	A	Jan-07	Nov-07
Base Exchange Rate on Bid Deadline	B	44.29	39.70
CERC notified escalation rate for Rupee-Dollar Exchange Rate for bid evaluation as on Bid Dead line	C	1.07%	1.07%
COD	D	Feb-12	Aug-12
Period in Years from Bid Deadline upto COD	F = D – A	5.16	4.82
Exchange rate as on CoD (Calendar Year basis)	$G = B * (1+C)^F$	46.71	41.87

98. The year to year variation in exchange rates shall be calculated as under using CERC escalation indices:

Sl. No.	Calander Year	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
A	BID Gujarat	44.29	44.76	45.24	45.73	46.22	46.71	47.21	47.72	48.23	48.74
	BID Haryana	39.70	40.12	40.55	40.99	41.43	41.87	42.32	42.77	43.23	43.69
B	CERC Escalation rate	41.29	43.42	48.35	45.74	46.67	53.49	58.63	61.03	64.13	67.26
C	% variation in Escalation rate	-8.91%	5.16%	11.35%	-5.40%	2.03%	14.61%	9.62%	4.08%	5.08%	4.88%
D	Applicable (for incremental actual wtd. Avg. FOB Gujarat)						46.71	51.20	53.29	56.00	58.74
E	Applicable (for incremental actual wtd. Avg. FOB Haryana)						41.87	45.90	47.77	50.20	52.65

Notes:

A USD rate escalated @ 1.07% p.a. on calendar year basis, as specified in bid assumptions

B Dollar-Rupee exchange variation rate on calendar year basis as worked out by CERC

C Year on year escalation in B above

D/E Adopting 2012 as base rate (due to COD) escalation % worked out in C applied on this base:

Particulars	Bid Date	Base exchange rate on Bid Deadline	Escalation rate	COD	Exchange rate as on CoD
Gujarat	Jan-07	44.29	1.07%	Feb-12	46.71
Haryana	Nov-07	39.70	1.07%	Aug-12	41.87

99. The exchange rate variation as computed above shall be applied on the incremental FoB prices of coal for working out the relief in INR.

IX. Computation of relief for Force Majeure

100. The Petitioner has provided a sample calculation of relief for force majeure for the month of March 2016 as under:

Parameters	Unit	Formula	Mar-16
Fuel Supply arrangement prior to Force Majeure			
Contracted GCV	Kcal/Kg	A	5200
Contractual FOB	USD/MT	B	25.70
Contracted Cost per 1000 Kcal	USD/1000 kCal	C = B / A	0.0049
Fuel Supply arrangement post to Force Majeure			
Actual GCV	Kcal/Kg	D	4575
Actual FOB	USD/MT	E	34.19
Actual Cost per 1000 Kcal	USD/1000 kCal	F = E / D	0.0075
Incremental Cost due to Force Majeure			
Incremental Cost per 1000 Kcal	USD/1000 kCal	G = F - C	0.0025
Net Heat Rate (Lower of Actual or CERC)	Kcal / kwh	H	2450
Actual Exchange Rate	Rs. / $	I	67.02
Energy Scheduled	Mus	J	556
Incremental Cost due to Force Majeure			
Total Rs. Crore	Rs. Cr	K = (G*H* I / 1000)* (J /10)	22.81
Less: Profit from Bunyu Mine	Rs. Cr	L	0.20

(As illustrated in 10 (a) (ii)			
Net Impact	Rs. Cr	M = K – L	22.61

101. In respect of Haryana PPAs, the Petitioner has given the following calculations for the month of March 2016:

Parameters	Unit	Formula	March, 2016
Scheduled Energy	MUs	A	885
Scheduled Energy from Imported coal (30%)	MUs	B = A * 30%	266
Scheduled Energy from Domestic Coal (70%)	MUs	C = A * 70%	620
Impact of Indonesian Regulation (30% of the Contracted Capacity)			
Fuel Supply arrangement prior to Force Majeure			
Contracted GCV	Kcal/Kg	D	5200
Contractual Cost	USD/MT	E	25.70
Contracted Cost per 1000 Kcal	USD/1000 kCal	F = E / D	0.0049
Fuel Supply arrangement post to Force Majeure			
Actual GCV	Kcal/Kg	G	4595
Parameters	**Unit**	**Formula**	**March, 2016**
Actual FOB cost	USD/MT	H	34.53
Actual Cost per 1000 Kcal	USD/1000 kCal	I = H / G	0.0075
Incremental Cost due to Force Majeure			
Incremental Cost per 1000 Kcal	USD/1000 kCal	J = I – F	0.0026
Transmission Losses	%	K	4.33%
Net Heat Rate (Lower of Actual or CERC) grossed up with Transmission Loss	kCal/ kWh	L	2614
Actual Exchange Rate	Rs/ USD	M	67.02
Incremental Cost per 1000 Kcal	Rs/ 1000 kCal	N = J * M	0.1723
Total Impact due to Indonesian coal regulation (only for 30%)	Rs. Crs	O = (N * L / 1000) * (B / 10)	11.96
Impact of Domestic Coal Shortfall (70% of the Capacity)			
ACQ for 1386 MW	MT	P	0.598
Capacity corresponding to 70% at Haryana Periphery	MW	Q	996.80

Auxiliary Loss	%	R	6.76%

ACQ corresponding to Haryana PPA	MT	S	0.479
Actual Receipt*	MT	T	0.479
% Domestic coal available	%	U	100%
Actual Shortfall in Domestic Coal	%	V	0%
Shortfall Energy to be Considered	Kwh	W = C * V	NIL
Landed Cost of Imported Coal	Rs/MT	X	3440
GCV of Imported coal	Kcal/Kwh	Y = G	4595
Per Unit Cost	Rs/Kwh	Z = (X / Y) * (L / 1000)	1.96
Transmission Charges	Rs/Kwh	AA	0.36
Per Unit Cost including Transmission Charges and Losses	Rs/Kwh	AB	2.32
Per Unit Cost including Transmission Charges and Losses	Rs/Kwh	AB	2.32
Quoted Tariff	Rs/Kwh	AC	2.181
Total Impact due to Shortage of Domestic Coal (only for 70%)	RsCr	AD = [(AB - AC) * W]	NIL
Total Impact	RsCr	AE = [O + AD]	11.96
Less: Profit from Bunyu Mine (As illustrated in 10 (b) (ii)	RsCr	AF	0.32
Net Impact	RsCr	AG = AE – AF	11.64

* Actual supply is capped at ACQ required for Haryana PPA.

102. Prayas has provided sample computation for the relief to the Petitioner under Force Majeure for the period from April, 2012 to April, 2016. The computations of Prayas for the month of March 2016 in respect of Gujarat PPA dated 2.2.2007 and Haryana PPAs dated 7.8.2008 are extracted below:

Gujarat PPA dated 2.2.2007

S. No.	Particulars			March, 2016
1.	Quoted Energy Charge (QEC)	INR per kWh	-	1.3495
2.	Landed cost of coal supported by quoted energy charge as per Bid Parameters	INR per MT	VC * GCV * (1-Aux)/ SHR	2942.273094

3.	Landed Coal cost supported by quoted energy charges @ EX Rate 44.69	USD per MT	(2)/ $ RATE	65.84
4.	Adjustment for freight, unloading, insurance etc	(as per Adani)	-	10.30
5.	FOB price of coal supported by Quoted Energy Charges	USD per MT	(3) – (4)	55.5
6.	HBA Index price of coal for 5200 GCV	USD per MT	-	41.95
7.	Difference between FOB and HBA	USD per MT	(6) – (5)	-13.6
8.	Exchange rate in applicable month	INR per USD	-	67.02
9.	Difference between FOB and HBA	INR per MT	(7) X (8)	-910.6270804
10.	Quantum of coal for normative availability 80%	MT	-	264187.5771
11.	Less: Quantum of 3000 Kcal @ 29%	MT	29% of (9)	76614.39737
12.	Quantum of coal of 5200 Kcal to be considered	MT	(10) – (11)	187573.1798
13.	Impact of FM in total	INR in crore	(12) X (9)	-17.0809217
14.	Impact of FM per unit	INR per kWh	(13)/ no. of units	-0.29654378

Haryana PPA dated 7.8.2008

S. No.	Particulars			March, 2016
1.	Quoted Energy Charge (QEC)	INR per kWh	-	2.181
2.	Adjustment for transmission charges and losses	INR per kWh	-	0.45
3.	Quoted Energy Charge after adjustment (VC)	INR per kWh	(1) – (2)	1.731
4.	Landed cost of coal supported by quoted energy charge in Rs./Ton (Bid para)	INR per MT	VC * GCV * (1-Aux)/ SHR	3774.0457
5.	Landed Coal cost supported by energy charges after adjustment in USD per ton @ EX Rate 42.42	USD per MT	(4)/ $ RATE	88.97
6.	Adjustment for freight, unloading, insurance etc	USD per MT	(as per Adani)	10.30
7.	FOB price of coal supported by Quoted Energy Charges after adjustment as	USD per MT	(5) – (6)	78.7

	mentioned above			
8.	HBA Index price of coal for 5200 GCV	USD per MT	-	41.95
9.	Difference between FOB and HBA in USD	USD per MT	(8) – (7)	-36.7
10.	Exchange rate of applicable month	INR per USD	-	67.02
11.	Difference between FOB and HBA in INR	INR per MT	(9) X (10)	-2460.9
12.	Impact taking into account domestic coal availability of different quantum at Normative	-	-	-
13.	Quantum of domestic coal available-100%	MT	-	0
14.	Impact of Indonesian Regulation	INR in Crore	(13) * (11)	0
15.	Impact per unit	INR per kWh	(14)/ no. of units	0
16.	Quantum of coal to be imported-10%	MT	10% of total qty of imported coal	37620.31098
17.	Impact of Indonesian Regulation	INR in Crore	(16) * (11)	-9.25789574
18.	Impact per unit	INR per kWh	(17)/ no. of units	-0.11287033
19.	Quantum of coal to be imported-20%	MT	20% of total qty of imported coal	75240.62197
20.	Impact of Indonesian Regulation	INR in Crore	(19) * (11)	-18.5157915
21.	Impact per unit	INR per kWh	(20)/ no. of units	-0.22574067
22.	Quantum of coal to be imported-30%	MT	30% of total qty of imported coal	112860.9329
23.	Impact of Indonesian Regulation	INR in crore	(22) * (11)	-27.7736872
24.	Impact per unit	INR per kWh	(23)/ no. of units	-0.338611

103. We have noticed that Prayas has derived the notional FoB price by way of reverse computation after excluding freight and Insurance charges from the Quoted Energy Charge. For this purpose the quoted Energy Charge is converted into USD by applying the Exchange Rates of 44.69 ₹/USD for GUVNL PPA and 42.42 ₹/USD for Haryana PPAs. Prayas has further suggested that the compensation shall be provided

only in the event the FoB derived from HBA Index for 5200 kcal/kg is higher than notional FoB derived as above. Prayas has also suggested that for Haryana PPA compensation is to be provided only for the quantity of shortfall in domestic coal under linkage. Prayas has submitted the sample calculations for the impact due to domestic coal shortage in four scenarios of usage of imported coal to meet the shortfall i.e. 0%, 10%, 20% and 30%. In our considered view, methodology based on back working cannot be considered since it takes into account number of assumptions to arrive at notional FoB in the absence of authenticated information available for such assumptions as the bidders are not required to disclose at the time of submission of bid any such parameters considered to arrive at the quoted Energy Charge rates.

104. As decided in this order, relief is to be granted to the Petitioner under Article 12.7(b) which shall correspond to a Force Majeure Event affecting the obligations of the Petitioner to supply power to the Procurers under the PPAs. While the energy charge rate depends on the landed cost of fuel which includes FoB cost, Ocean Freight, Port Handling charges etc., the Indonesian Regulations requires the alignment of the coal price in the CSA to the benchmark price. In other words, the impact of Indonesian Regulations is confined to the difference between the FoB price of coal as per the CSAs prevailing prior to the

Indonesian Regulations and the FoB price of coal aligned to the benchmark price after the Indonesian Regulations. Accordingly, the Commission is of the view that the relief for Indonesian Regulation shall be restricted to the difference between the FoB cost incurred by the Petitioner for import of coal from Indonesia pursuant to the Indonesian Regulations and FoB price of coal as per the CSA dated 26.7.2010 had the Indonesian Regulations not intervened. The Commission is of the view that there is no need to consider other components of landed cost of imported coal for granting relief since Indonesian Regulations do not have impact on these elements. However, in respect of the force majeure event related to shortage/non-availability of domestic coal, the Petitioner would be required to procure imported coal to mitigate the shortfall in domestic coal to meet its contractual obligations. Therefore, the relief for the imported coal consumed including the imported coal required for meeting the shortfall of domestic coal shall be confined to the difference between the FoB cost of imported coal under the CSA and weighted average FoB cost of imported coal required to generate the actual or scheduled generation whichever is lower.

105. A sample formulation in respect of Gujarat PPA is given as below:

Sample Calculation for March 2016_Gujarat PPA

A	Generation (Lower of Scheduled or Actual) during the month	MU	555.76
B	Auxiliary consumption		6.50%

C	Gross Generation corresponding to A above={A/(1-B)}	MU	594.40
D	Gross Generation corresponding to Indonesian Coal={C*X}	MU	594.40
E	Heat Rate	Kcal/kWh	2150
F	Contracted GCV	Kcal/kg	5200.00
G	Contracted FOB	USD/Ton	25.70
H	Contracted USD/Kcal={G/F/1000}	USD/Kcal	0.0000049
I	Actual Wtd Avg GCV of Indonesian Coal Consumed#	Kcal/kg	4521.90
J	Actual Wtd Avg FOB of Indonesian Coal Consumed#	USD/Ton	32.73
K	Actual USD/Kcal={J/I/1000)	USD/Kcal	0.0000072
L	Incremental USD/Kcal={(K-H)}	USD/Kcal	0.0000023
M	Exchange Rate@ (as applied above based on workings in Table)	Rs./USD	58.7352
N	Total Impact per unit={L*E*M}	Rs./kWh	0.290
O	**Total Impact={D*N/10}**	Rs. Crs	**17.23**
P	Profit from mine in Indonesia&	Rs. Crs	1.85
Q	**Net Impact={O-P}**		**15.39**
R	Tonnage of total coal used for generation at A^	Ton	290000
S	Tonnage of Indonesian coal^	Ton	290000
T	Wt. Avg GCV of total coal^	Kcal/Kg	4521.90
U	Wt. Avg GCV of Indonesian coal^	Kcal/Kg	4521.90
V	Heat Value of total coal={R*T}	Kcal	1311350000000
W	Heat Value of Indonesian coal={S*U}	Kcal	1311350000000
X	Ratio of heat value (W/V)		100.00%

G	Contracted FOB*	*	As per CSA
I, J	Actual Wtd Average GCV/FOB#	#	Actual Wtd Average FOB to be certified by Auditor; and Actual Wtd Average GCV(ARB) to be certfied as per third party independent sampling agency
M	Exchange Rate@	@	To be computed based on workings principals given in this order
P	Profit from mine in Indonesia&	&	To be worked out as per formulation given in this order

I, J, R, S, T, U		^	To be corrected and used as per practice on which bills are being raised and paid by beneficiaries. These values to be certified by Auditor

Notes:

1. The coal imported from Indonesia only will be considered for calculating the relief.
2. The above calculations are based on the assumptions that the FOB Prices entered in the PSL are less than or equal to HBA Prices of the month of despatches for the quality of the coal.
3. The above calculations are for illustrative purpose only. Actual calculations need to be worked out on aforesaid formula subject to verification by procurers and as certified by auditors.

106. A sample formulation in respect of Haryana PPA is given as below:-

Sample Calculation for March 2016_Haryana PPA

A1	Generation (Lower of Scheduled or Actual) during the month	MU	885.00
A2	Generation on Domestic coal included in above {(Y*Z/E1/1000)*(1-B)*(1-AA)}	MU	667.57
A	Balance of Generation to be met from Indonesian coal {A1-A2}	MU	217.43
B	Auxiliary consumption		6.50%
C	Gross Generation corresponding to A above={A/((1-B)*(1-AA))}	MU	243.07

D	Gross Generation corresponding to Indonesian Coal={C*X}	MU	243.07
E1	Heat Rate – Domestic	Kcal/kWh	2230
E2	Heat Rate - Indonesian Coal	Kcal/kWh	2150
F	Contracted GCV	Kcal/kg	5200.00
G	Contracted FOB*	USD/Ton	25.70
H	Contracted USD/Kcal={G/F/1000}	USD/Kcal	0.0000049
I	Actual Wtd Avg GCV of Indonesian Coal Consumed#	Kcal/kg	4595.00
J	Actual Wtd Avg FOB of Indonesian Coal Consumed#	USD/Ton	33.34
K	Actual USD/Kcal={J/I/1000)	USD/Kcal	0.0000073
L	Incremental USD/Kcal={(K-H)}	USD/Kcal	

			0.0000023
M	Exchange Rate[@] (as applied above based on workings in Table)	Rs./USD	52.6482
N	Total Impact per unit={L*E2*M}	Rs./kWh	0.262
O	**Total Impact={D*N/10}**	Rs. Crs	**6.37**
P	Profit from mine in Indonesia[&]	Rs. Crs	0.26
Q	**Net Impact={O-P}**	Rs. Crs	**6.11**
R	Tonnage of total coal used for generation at A^	Ton	656179
S	Tonnage of Indonesian coal^	Ton	656179
T	Wt. Avg GCV of total coal^	Kcal/Kg	4595.00
U	Wt. Avg GCV of Indonesian coal^	Kcal/Kg	4595.00
V	Heat Value of total coal={R*T}	Kcal	3015142505000
W	Heat Value of Indonesian coal={S*U}	Kcal	3015142505000
X	Ratio of heat value (W/V)		100.00%
Y	Tonnage of Domestic coal used in generation at A^	Ton	493544
Z	Wt. Avg GCV of Domestic coal^	Kcal/Kg	3372.00
AA	Transmission loss as per Actuals		4.33%

G	Contracted FOB*	*	As per CSA
I, J	Actual Wtd Average GCV/FOB[#]	#	Actual Wtd Average FOB to be certified by Auditor; and Actual Wtd Average GCV(ARB) to be certified as per third party independent sampling agency
M	Exchange Rate[@]	@	To be computed based on workings principals given in this order
P	Profit from mine in Indonesia[&]	&	To be worked out as per formulation given in this order
I, J, R, S, T, U		^	To be corrected and used as per practice on which bills are being raised and paid by beneficiaries. These values to be certified by Auditor

Notes:

1. The coal imported from Indonesia only will be considered for calculating the relief.
2. The above calculations are based on the assumptions that the FOB Prices entered in the PSL are less than or equal to HBA Prices of the month of despatches for the quality of the coal.

3. The above calculations are for illustrative purpose only. Actual calculations need to be worked out on aforesaid formula subject to verification by procurers and as certified by auditors.

X. Carrying Cost on the Relief allowed

107. The Petitioner has submitted that the hardship/losses have been suffered by APL on account of promulgation of Indonesian Regulations and Shortage of Domestic Coal since February, 2012 in respect the power supplied under Gujarat PPA and since August, 2012 in respect of Haryana PPA for which APL has availed funds through various source of lending by incurring huge financial cost/charges/interest. The Petitioner has requested that such additional expenditure being the direct consequences of the promulgation of Indonesian Regulations, the Petitioner should be restituted by allowing the interest/carrying cost. The Respondents have submitted that unless the reliefs are crystallised, no carrying cost should be admissible. We are in agreement with the Respondents. The impact of force majeure though will be from the date of occurrence of the Force Majeure events and its compensation billing will be receivable effective respective months, the reliefs will be crystallised through this order. Therefore, the Petitioner shall be not be entitled for carrying cost for the past period. The arrears for the past period shall be paid in six equal monthly instalments by the Procurers in proportion to their share in the contracted capacity, from the date this

order is permitted to be implemented by the Hon'ble Supreme Court. The Petitioner shall accordingly work out the relief for the past as well as the future period. Further, for the future period, the Petitioner shall be entitled for carrying cost in case of default in payment of the arrears.

108. All the future claims for Force Majeure relief shall be reflected in the monthly bill under a separate head. The payment of the same shall be done by the Discoms as per the payment mechanism specified under the PPA for regular monthly bill. Any delay shall attract delay payment Interest applicable for regular monthly bill under the PPA. The Petitioner shall furnish supporting Documents i.e. the invoices and quality Certificates for import of coal, Certificate/bills for quantity received from coal companies for the Domestic Coal, Exchange rate etc.

109. Adjustments for mining profits corresponding to the quantity of coal supplied under the Gujarat PPA and Haryana PPAs shall be carried out at the time of annual reconciliation in line with the principles laid as above.

110. In order to reduce dependence on imported coal, the petitioner is directed to explore the possibility of tying up of domestic coal in order to ensure supply of power to the procurers as per the quoted tariff.

Summary of the Findings

111. In view of the above discussion, the summary of our findings are as under:-

(a) In the light of the judgment of the Appellate Tribunal, it is held that the petitioner had Coal Sales Agreements or arrangement for the entire quantum of coal required for supply of power to the Procurers and the Indonesian Regulations has completely wiped out the premise on which the petitioner had quoted the tariff in the bid.

(b) The petitioner is entitled to relief for force majeure event in terms of Article 12.7 (b) of the PPA.

(c) Relief is admissible in respect of the coal procured from Indonesia.

(d) The difference between the coal price based on the Coal Sales Agreements and FoB price of coal ex-Indonesia (i.e. the benchmark price as per Indonesian index or the actual price paid for purchase of the similar quality of coal whichever is lower) shall be paid by the Procurers to the Petitioner as relief for Force Majeure due to promulgation of Indonesian Regulations in

proportion to the share of the Procurers in the contracted capacity from Mundra Power Project.

(e) This relief will be applicable in respect of coal imported from Indonesia for consumption corresponding to the actual or scheduled generation during the month, whichever is lower, in respect of Gujarat PPA. In respect of Haryana PPAs, the relief shall be worked out first after accounting for generation on domestic coal consumed based on normative parameters, and the balance generation corresponding to the actual or scheduled generation during the month whichever is lower, based on imported coal.

(f) The petitioner shall obtain and provide to the procurers a certificate from Mahanadi Coalfield Ltd about the actual availability and actual supply of coal during each calendar year on the basis of the FSA dated 9.6.2012.

(g) The Petitioner should endeavor to source domestic coal for both Haryana and Gujarat PPA to the maximum extent to reduce dependence on imported coal, subject to technical feasibility.

(h) The petitioner shall be entitled to relief as per the mechanisms given in this order.

(i) The petitioner shall raise the monthly bill in accordance with the provisions of the PPA read with the directions given in this order.

(j) The profit earned on account of sale of coal at Benchmark price corresponding to the quantity of coal received from the Bunyu mines in Indonesia in which investments have been made by Adani Enterprises Limited shall be adjusted as per formulation given in this order.

(k) The petitioner and the procurers shall carryout true-up exercise at the end of each contract year.

112. The above order shall be subject to the outcome of the Civil Appeal No. 5399-5400/2016 and related Civil appeals pending before the Hon'ble Supreme Court of India. In order dated 15.7.2016 in the above mentioned Civil appeals, Hon'ble Supreme Court had directed as under:

> "It is made clear that the order passed by the CERC shall not be given effect to, without getting permission from this Court."

In view of the above directions of the Hon'ble Supreme Court, this order would be given effect to only after grant of permission by the Hon'ble Supreme Court.

113. The petition is disposed of in terms of the above.

sd/-	sd/-	sd/-	sd/-
(Dr. M.K. Iyer)	**(A.S. Bakshi)**	**(A.K. Singhal)**	**(Gireesh B. Pradhan)**
Member	**Member**	**Member**	**Chairperson**