CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 159/MP/2012

Coram:
Shri Gireesh B. Pradhan, Chairman
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 Sections 61, 63 and 79 of the Electricity Act, 2003 for establishing an appropriate mechanism to offset in tariff the adverse impact of the unforeseen, uncontrollable and unprecedented escalation in the imported coal price due to enactment of new coal pricing Regulation by Indonesian Government and other factors

And In the matter of

Coastal Gujarat Power Limited
34, Sant Tuka Ram Road
Carnac Bunder, Mumbai-400 021

.....Petitioner

Vs

1) Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhawan
Race Course, Vadodara-390 007, Gujarat

2) Maharashtra State Electricity Distribution Company Limited
4th Floor, Prakashgad, Plot No. G-9
Bandra (East), Mumbai-400 051, Maharashtra

3) Ajmer Vidyut Vitaran Nigam Limited
Hathi Bhata, Old Power House
Ajmer, Rajasthan

4) Jaipur Vidyut Vitaran Nigam Limited
Vidyut Bhawan, Janpath
Jaipur, Rajasthan

5) Jodhpur Vidyut Vitaran Nigam Limited
New Power House, Industrial Area
Jodhpur, Rajasthan

6) Punjab State Power Corporation Limited
The Mall, Patiala, Punjab

7) Haryana Power Generation Corporation Limited
Room No. 329, Sector 6
Panchkula, 134 109, Haryana

8) Secretary, Ministry of Power,
Sharam Shakti Bhawan
New Delhi-110 001

9) Prayas Energy Group
Unit III A & B, Devgiri
Joshi Railway Museum Lane
Kothrud Industrial Area
Kothrud, Pune-411038 **..... Respondents**

Parties Present:

1) Mr. C.S. Vaidyanthan, Senior Advocate, CGPL
2) Shri Amit Kapur, Advocate, CGPL
3) Shri Apoorva Mishra, Advocate, CGPL
4) Shri Abhishek Munot, Advocate, CGPL
5) Shri Akshat, Advocate, CGPL
6) Shri Gaurav Dudeja, Advocate, CGPL
7) Shri Kunal Kaul, Advocate, CGPL
8) Shri Bijay Kumar Mohanty, CGPL
9) Shri Abhay Kumar, CGPL
10) Ms. Pinky Anand, Senior Advocate, MSEDCL
11) Ms. Ramni Taneja, Advocate, MSEDCL
12) Ms. Kiran Gandhi, Advocate, MSEDCL
13) Shri Satish Chavan, MSEDCL
14) Shri Paresh Bhagwat, MSEDCL
15) Ms. Saudamini Sharma, MSEDCL

16) Ms. Somya Rathore, MSEDCL
17) Shri Nitish Gupta, Advocate, GUVNL
18) Shri M. G. Ramachandran, Advocate, Prayas
19) Ms. Ranjitha Ramachandran, Advocate, Prayas
20) Ms. Anushree Bardhan, Advocate, Prayas
21) Ms. Poorva Saigal, Advocate, Prayas
22) Shri Shubham Arya, Advocate, Prayas
23) Ms. Swapna Seshadri, Advocate, PSPCL
24) Shri Sandeep Rajpurohit, PSPCL
25) Shri Anand K. Ganeshan, Advocate, PSPCL
26) Ms. Sarika Jerath, Advocate, CGPL
27) Shri G. Umapathy, Advocate, HPPC &Rajasthan Discoms
28) Ms. R. Mekhala, Advocate, HPPC &Rajasthan Discoms
29) Shri B. L. Sharma, Rajasthan Discoms
30) Shri S.K. Nair, Advocate, GUVNL
31) Shri K.K. Sharma, CGPL
32) Shri Arun Srivastava, Tata Power
33) Shri Saurabh Shankar, Tata Power
34) Shri Puneet, Tata Power
35) Shri Saurabh Srivastava, Tata Power
36) Shri Rakhi Banerjee, CGPL
37) Shri Varun Agarwal, Advocate, MSEDCL
38) Shri Ashwani Chitnis, Prayas Energy Group
39) Shri N.A. Patel, Advocate, GUVNL
40) Shri Adiyta Dewan, GUVNL
41) Shri Anand K. Ganesan, Advocate, PSPCL
42) Shri A.S. Chavan, MSEDCL
43) Shri Nirav Shah, Advocate, MSEDCL
44) Shri Udit Gupta, Advocate, MSEDCL
45) Shri Vikrant Saini, HPPC
46) Shri Ravi Juneja, HPPC

ORDER

Background of the Case

The Petitioner, Coastal Gujarat Power Limited (CGPL), a subsidiary of Tata Power Company Ltd, has set up a 4000 MW Ultra Mega Power Project at Mundra in the State of Gujarat (Mundra UMPP)

based on imported coal after Tata Power Company Ltd was selected as the successful bidder based on the competitive bidding carried out in accordance with the Guidelines issued by the Central Government under Section 63 of the Electricity Act, 2003 (2003 Act). The tariff of Mundra UMPP has been adopted by this Commission under Section 63 of the 2003 Act vide order dated 19.9.2007 in Petition No. 18/2007.

2. The Petitioner has entered into a PPA dated 22.4.2007 with the distribution companies in the States of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana for supply of 3800 MW power from Mundra UMPP for a period of 25 years, namely, Gujarat Urja Vikas Nigam Limited (GUVNL), Maharashtra State Electricity Distribution Company Limited (MSEDCL), Ajmer Vidyut Vitaran Nigam Limited (AVVNL), Jaipur Vidyut Vitaran Nigam Limited (JVVNL), Jodhpur Vidyut Vitaran Nigam Limited (JdVVNL), Punjab State Power Corporation Limited (PSPCL) and Haryana Power Generation Corporation Limited (collectively referred to as "Procurers").

3. Mundra UMPP has been envisaged to be executed on imported coal. The estimated coal requirement for supply of contracted capacity to the Procurers is approximately 12 MMTPA. Tata Power entered into a Coal Sales Agreement dated 30.3.2007 with IndoCoal Resources

(Cayman) Limited (IndoCoal) for supply of 10.11 MMTPA ± 20% (12.132 MMTPA) for three of its power plants namely, Trombay, CGPL and Coastal Maharashtra. In the said CSA, the original agreed quantum of coal for CGPL was 5.85 MMTPA ± 20% (7.02 MMTPA). Tata Power had also entered into an agreement with the Petitioner on 9.9.2008 for meeting the balance coal requirement of 6.15 MTTPA on best effort basis including diversion of coal meant for Coastal Maharashtra as per the mutual terms and conditions agreed between the parties. The Petitioner entered into a CSA dated 31.10.2008 with IndoCoal, for supply of 5.85 MMTPA (±20%). The information regarding the CSA was conveyed by the Petitioner to GUVNL, the lead Procurer vide its letter dated 18.12.2008. Subsequently, through the Assignment and Restatement Agreement dated 28.3.2011, Tata Power allocated 3.51 MMTPA (±20 %) of coal earlier meant for Coastal Maharashtra facility in favour of the Petitioner. The Petitioner has been meeting the coal requirement of Mundra UMPP by sourcing coal on the basis of these two CSAs.

4. Government of Indonesia promulgated the "Regulation of Ministry of Energy and Mineral Resources No.17 of 2010 regarding Procedure for Setting Mineral and Coal Benchmark Selling Price" (hereinafter "Indonesian Regulations") on 23.9.2010. According to the Indonesian

Regulations, the holders of mining permits for production and operation of mineral and coal mines were required to sell minerals and coal in domestic and international markets including to their affiliates by referring to the benchmark price and the spot price of coal in the international market. All long term coal contracts for supply of coal from Indonesia were required to be aligned with the Indonesian Regulations within a period of 12 months i.e. by 22.9.2011.

5. On account of the promulgation of Indonesian Regulations, the Petitioner was supplying power to the Procurers by purchasing coal at a higher price than what was agreed in the CSAs without any adjustment of tariff. The Petitioner took up the matter with GUVNL, the lead procurer and the Ministry of Power, Government of India vide its letter dated 4.8.2011. The Petitioner also took up the matter with the Procurers in the Joint Monitoring Meeting dated 6.2.2012 for suitable adjustment in tariff. The Procurers sought some further details which the Petitioner furnished by its letter dated 6.3.2012. The Petitioner also approached the Indonesian Government vide its letter dated 16.2.2012 requesting to exempt the existing CSAs from the purview of Indonesian Regulations but met with no success. IndoCoal which had CSAs with the Petitioner for supply of coal to Mundra UMPP issued a notice to the Petitioner on 9.3.2012 calling upon it to align the original CSAs with the Indonesian

Regulations. The Petitioner amended the CSAs on 23.5.2012 and 22.6.2012 to align them with the Indonesian Regulations.

6. Under these circumstances, the Petitioner filed the present petition seeking relief under Article 12 (Force Majeure) and Article 13 (Change in Law) of the PPA and Section 79 read with Sections 61 and 63 of the 2003 Act with the following prayers:

> "(a) Establish an appropriate mechanism to offset in tariff the adverse impact of (i) the unforeseen, uncontrollable and unprecedented escalation in the imported coal price and (ii) the change in law by Government of Indonesia.
>
> (b) Evolve a methodology for future fuel price pass through to secure the Project to a viable economic condition while building suitable safeguards to pass to Procurers benefit of any reduction in imported coal price.
>
> (c) Pass any other order that this Commission may deem fit in the facts and circumstances of the present case."

7. After conducting detailed hearings and considering the submissions of the parties and material placed on record, the Commission issued an order dated15.4.2013holding that (a) the subsequent events on account of promulgation of Indonesian Regulations have wiped out the premise on which bid was submitted by CGPL and therefore, CGPL is required to be compensated for the hardship faced by it due to the subsequent events; (b) Such subsequent events do not constitute Change in Law and Force Majeure in terms of the provisions of the PPA; (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 for mitigating the impact of the unprecedented increase in price of imported coal on account of promulgation of Indonesian Regulations. In order to compute the relief/compensation to be granted to CGPL, the Commission constituted an Expert Committee comprising two independent members, representatives of CGPL and the procurer States/distribution companies. On 16.8.2013, the Expert Committee submitted its report to the Commission. After considering the suggestions and objections of the parties on 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 to be paid by the Procurers to the Petitioner alongwith the mechanism for its recovery from the Procurers.

8. The orders of the Commission dated 15.4.2013 and 21.2.2014 were challenged by the Procurers and the Consumer Representatives before the Appellate Tribunal for Electricity (Appellate Tribunal) in Appeal Nos. 151 of 2013, 97 of 2014, 91 of 2014, 100 of 2014, 115 of 2014, 139 of 2014, 124 of 2014 and 133 of 2014. The Petitioner filed an Appeal before the Appellate Tribunal (DFR. No.1579/2014) challenging

the Commission's order dated 15.4.2013 rejecting the claims of the Petitioner for Change in Law and Force Majeure alongwith an application for condonation of delay. The Appellate Tribunal rejected the application for condonation of delay and dismissed the appeal. The Petitioner filed Civil Appeal No. 9095 of 2014 challenging the Appellate Tribunal's order dated 18.9.2014 which is pending before the Hon'ble Supreme Court. The Petitioner filed IA No.412 of 2014 before the Appellate Tribunal seeking liberty to make its submissions on Change in Law and Force Majeure and urged before the Appellate Tribunal that the Hon'ble Supreme Court's order dated 313.2015 in Adani's case be made applicable in the case of the Petitioner on account of similarity of facts of both cases. The Appellate Tribunal permitted the Petitioner to raise the plea of force majeure or change in law to support the compensatory tariff granted by the Commission claiming parity with the order dated 31.3.2015 passed in Civil Appeal No.10016 of 2014 in Adani's case. The Appellate Tribunal in its Full Bench Judgement dated 7.4.2016 set aside the orders of the Commission dated 15.4.2013 and 21.2.2014 and allowed the appeals with following observations/directions:

(a) The Commission has no regulatory power under Section 79(1)(b)of the 2003 Act to vary or modify the tariff or otherwise grant Compensatory Tariff to the generating companies, in case of

tariff determined under Section 63 of the 2003 Act. In case force majeure or change in law is made out, relief provided under the PPA can be granted under the adjudicatory power.

(b) Change in Law provided under Article 13 of the PPA or under Clause 4.7 of the Competitive Bidding 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.

(c) Increase in price of coal on account of the intervention by the Indonesian Regulations has resulted in a Force Majeure event, adversely impacting CGPL's Mundra UMPP. CGPL is entitled to relief as available to it under the PPA dated 22.4.2007 and in the light of the Full Bench Judgment dated 7.4.2016.

9. The Appellate Tribunal set aside the orders dated 15.4.2013 and 21.2.2014 in the present petition and remanded the matter to the Commission to assess the impact of Force Majeure Event on Mundra UMPP of CGPL and give such relief as may be admissible under the PPA and in the light of the judgement after hearing the parties. Relevant excerpts of the judgement 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.

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."

Proceedings before the Commission

10. 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 (promulgation of Indonesian Regulations) on Mundra UMPP; and (b) the proposed relief to be granted to CGPL in light of the Judgment dated 7.4.2016.In compliance with the directions of the Commission, the Petitioner has filed its written submissions dated 11.5.2016 delineating the extent of impact of Force Majeure event on the Mundra UMPP and the proposed methodology for granting relief in terms of the PPA. The Petitioner has prayed for approval of the methodology for grant of relief to CGPL to give effect to the judgement of the Appellate Tribunal. GUVNL, MSEDCL, HPPC,

Rajasthan Utilities, PSPCL and Prayas Energy Group (Prayas) have filed their replies and the Petitioner has filed its rejoinders. Subsequently, the matter was heard at length with the participation of the Petitioner and the Respondents including Prayas participated in the proceedings before the Commission and presented their cases. The Commission vide Supplementary Record of Proceedings dated 22.7.2016 directed the Petitioner to clarify certain queries and submit certain information/documents. The Petitioner vide its affidavit dated 9.8.2016 has submitted the required information. In paras 42 and 43 of the said affidavit, the Petitioner submitted that there is a Shareholders Agreement between Tata Power and the Indonesian Mining Companies and the said agreement being a confidential in nature and the parties to the agreement being bound by the confidentiality clause provided therein, permission be granted to file the Shareholder's Agreement in a sealed cover with the request that the said document is not disclosed to any other person and is used only for the purpose of adjudicating the present matter. The Commission held a hearing on 15.9.2016 in order to consider the request of CGPL to maintain confidentiality of the Shareholder's Agreement submitted by the Petitioner. During the hearing, learned Senior Counsel for the Petitioner submitted that "CGPL intends to file an affidavit containing the extracts of the Shareholders

Agreement which are relevant to the adjudication of the issue in the present proceedings relating to CGPL which can be shared with the respondents including Prayas." Learned Counsels for the respondents and Prayas expressed no objection to the said suggestion and accordingly, the request of the learned Senior Counsel for the Petitioner was allowed. Subsequently, the Petitioner vide its affidavit dated 23.9.2016 has filed the relevant excerpts of the Shareholders' Agreement after serving the copy of the affidavit on the respondents and Prayas.

11. In response to the Written Submissions of the Petitioner dated 11.5.2016, replies have been filed by GUVNL, MSEDCL, Haryana Utilities, Rajasthan Utilities and Prayas and the Petitioner has filed its rejoinders. GUVNL, MSEDCL, Prayas and the Petitioner have filed written submissions after conclusion of the hearings.

12. The Petitioner in its affidavit dated 11.5.2016 has submitted that in the Full Bench Judgement dated 7.4.2016, the Appellate Tribunal has come to the conclusion that promulgation of Indonesian Regulations amounts to a Force Majeure event in terms of the provisions of the PPA dated 22.4.2007. The Petitioner has submitted that the Appellate Tribunal has returned the findings that (a) the promulgation of

Indonesian Regulations has wiped out the fundamental premise on which CGPL had quoted its bids thereby making its project commercially unviable and has hindered/impaired the performance of CGPL under the PPA; (b) the fact that CGPL had quoted part of its tariff as non-escalable cannot be taken against it; (c) CGPL had to pay exorbitantly high cost of coal from Indonesia making fulfilment of its contractual obligations commercially impracticable; (d) the competitive advantage of securing coal at lower prices that CGPL was enjoying by acquiring mining rights in Indonesia or by entering into long term Coal Sales Agreements with the coal suppliers in Indonesia appears to have been fundamentally altered/wiped out after the coal sales from Indonesia are required to be aligned with international benchmark prices of coal; (e) the adjudicatory powers available to the Commission under Section 79(1)(f) of the 2003 Act and Article 17.3 of the PPA can be used to give relief to the generator where a case of Force Majeure has been made out under the PPA. The Petitioner has submitted that the petition has been remanded to the Commission to assess the impact of Force Majeure on Mundra UMPP and give such relief to the Petitioner as available under the PPA and in the light of the Full Bench Judgement dated 7.4.2016.The Petitioner has submitted that in the light of the judgement, the scope of the present remand is limited to (a) assessing the impact of promulgation

of Indonesian Regulations (Force Majeure) on Mundra UMPP in terms of the provisions of the PPA read with the Appellate Tribunal's Judgment dated 7.4.2016 and (b) granting relief to CGPL. The Petitioner has submitted that Section 79(1)(f) of the 2003 Act read with Articles 12.3, 12.4, 12.7, 13.2 and 17.3 of the PPA and Clause 5.17 of the Competitive Bidding Guidelines empower this Commission to fashion a relief to mitigate the adverse impact of promulgation of Indonesian Regulations on Mundra UMPP.

13. The Petitioner has submitted that Article 4.5 of the PPA deals with the extension of time when the project is affected by Force Majeure; Article 12.3 provides for definition of Force Majeure and Article 12.4 deals with Force Majeure exclusions; Article 12.7 deals with available relief for Force Majeure; Article 13.2 deals with principles for computing the impact of change in law i.e. putting the affected party to the same economic position as if the change in law has not occurred; and Para 5.17 of the Competitive Guidelines deal with adjudication of disputes arising out of the claim for any change in or regarding determination of tariff or tariff related matters. The Petitioner has submitted that Article 12.7 of the PPA entitles CGPL to a relief on account of Force Majeure events. Article 12.7(b) is an inclusive clause which provides that an affected party is entitled to a relief, including the relief under Article 4.5

of the PPA. Article 4.5 of the PPA provides for extension of time on account of Force Majeure event leading to termination of the PPA, if the Force Majeure event continues beyond the contractually agreed period. The Petitioner has submitted that Article 12.7(b) of the PPA is of wide amplitude, whereby a party affected by a Force Majeure event is entitled to a relief beyond extension of time or termination of the PPA. The Petitioner has submitted that the word(s) 'relief' or 'entitled to a relief' used under Article 12.7(b) has not been defined under the PPA. The Petitioner has submitted that going by the dictionary meaning and judicial interpretation of the word "relief", it denotes a remedy for a wrong for lightening or deliverance or removal of hardship, burden or grievance and includes providing for compensation/mitigation in the peculiar facts of the case. Further, in the light of the interpretation of the word "include" by the Supreme Court in the Regional Director, Employees State Insurance Corporation vs. High Land Coffee Works of P.F.X Saldanha and Sons and Anr.{(1991) 3 SCC 617} and in the South Gujarat Roofing Tiles Manufacturers Association and Anr. vs. the State of Gujarat and Another {(1976) 4 SCC 601(Para 3)}, the Petitioner has submitted that the word "include" enlarges the scope of the preceding words or it adds to a word or phrase a meaning which does not belong to it. The Petitioner has submitted that the PPA is a long term contract with the

intent that the parties continue to perform their obligations under the PPA and therefore, Article 12.7 read with Article 17.3 of the PPA gives adjudicatory powers to this Commission to mould a relief, in the facts and circumstances of the present case, to mitigate the adverse impact of Indonesian Regulations and to enable CGPL to continue performance of its obligations under the PPA in an unhindered manner. According to the Petitioner, Article 12.7(b) of the PPA contemplates the following reliefs available to an affected party for Force Majeure:

(a) Relief which would mitigate the effect of the Force Majeure event (including but not limited to relief under Article 4.5).

(b) A restitutive provision and is aimed at providing ameliorative relief to the Affected Party suffering from the Force Majeure event.

(c) Any other relief, to be moulded by the Appropriate Commission, as per the facts and circumstances of the case.

The Petitioner has submitted that the aforementioned interpretation is also in line with the interpretation given by the Hon'ble Supreme Court in Dhanrajamal Gobindram's case to the term "Force Majeure ".The Petitioner has further submitted that the PPA envisages various forms of reliefs in various situations being termination, extension of time, liquidated damages, restitution etc. Therefore, in the present situation, in

order to negate the impact of Force Majeure event and continue the performance of the parties unhindered, the Petitioner ought to be restituted to the same economic position as if the promulgation of Indonesian Regulations had not occurred. The Petitioner has submitted that while computing the relief to be granted to CGPL, the Commission may seek parity with principles for compensation under the Indian Contract Act, 1872 and/or common law principles, particularly, the principles governing grant of compensation under Sections 73 to 75 of the Indian Contract Act.

14. The Petitioner has submitted that in the absence of any pre-determined formula for compensating CGPL on account of the Force Majeure event (promulgation of Indonesian Regulations), CGPL ought to be granted a relief of compensation/restitution/mitigation for change in Free on Board (FoB) price of coal due to the promulgation of Indonesian Regulations in light of the findings of the Appellate Tribunal. The Petitioner has also sought compensation from 7.3.2012 (i.e. from the COD of Unit 1) alongwith applicable interest/carrying cost.

15. The Petitioner has suggested (a) Mechanism for grant of relief for the past period (i.e. period from 7.3.2012 till the time quantification mechanism is decided by the Commission) and (b) Mechanism for grant

of relief for the future period (i.e. period after the quantification mechanism is decided by the Commission).

16. As regards computation of relief for the past period, the Petitioner has proposed the following mechanism/formula:

(a) The cost of fuel recovered by CGPL (in US Dollars and on FoB basis) can be computed/worked out on the basis of monthly Fuel Energy Charges reflected in Schedule 11 of the PPA.

(b) The actual fuel cost incurred by CGPL (in US Dollars and on FoB basis) can be computed on the basis of the coal consumed by Mundra UMPP for each month, as certified by its Statutory Auditors based on Audited Financial Statements.

(c) The adverse impact on CGPL due to increase in FoB price of imported coal, is the difference between fuel cost incurred by CGPL and fuel cost recovered by CGPL.

(d) Applicable Exchange Rate as per Schedule 7 of the PPA in Rs/USD (Monthly Billing).

(e) Relief of adverse impact on CGPL (which is calculated above in USD), on account of Force Majeure event, to be converted in Indian Rupees.

Based on the aforementioned mechanism/formula, CGPL has provided a sample calculation, computing the impact/relief on account of promulgation of Indonesian Regulations for the month of August, 2013 and August, 2015 at Annexure P-3 to the affidavit dated 11.5.2016.

17. The Petitioner has submitted that the above sample calculations do not include any interest cost/carrying cost. However, for incurring such unforeseen financial burden, the Petitioner had availed funds through various Lending Institutions for which CGPL incurred huge financial cost/charges/interest and accordingly, the Petitioner ought to be restituted for such additional financial cost/charges/interest borne by it for the past period as the same is a direct consequence of the promulgation of Indonesian Regulations. The Petitioner has submitted that once the suggested mechanism is approved by the Commission, the Petitioner would provide the month-wise computation of relief for the past period along with all underlying supporting documents verified by statutory auditors. The Petitioner has submitted that in case any other formula/mechanism is prescribed by this Commission, the Petitioner shall compute the relief of Force Majeure (if acceptable to CGPL) in terms thereof and shall also provide all necessary supporting/underlying documents.

18. The Petitioner has submitted that in order to minimize the impact of

increase in price of fuel on FoB basis, it has adopted ways and means to minimize the impact of such manifold increase in price of fuel, being (a) Usage of high CV Coal from various geographies as and when available on distress sale basis; (b) Procuring low cost coal for Mundra UMPP during the last four years, though usage of low cost coal is not a viable option; (c) Procuring low cost fuel to minimize the impact of FoB cost/losses despite incurring additional cost/ losses on account of ocean freight and variable fuel handling charges. The Petitioner has submitted that both ocean freight and fuel handling cost have not been claimed within the scope of relief of Force Majeure.

19. The Petitioner has submitted that the promulgation of Indonesian Regulations is a continuing Force Majeure event and accordingly, the Petitioner has proposed a mechanism/formula for computing the losses/adverse impact on account of promulgation of Indonesian Regulations for the future period as under:

(a) The cost of fuel recovered by CGPL (in US Dollars and on FoB basis) can be computed on the basis of monthly Fuel Energy Charges (as per Schedule 11 of the PPA).

(b) The cost of coal (in US Dollars and on FoB basis) can be computed based on monthly HBA Index for Melawan Coal, Heat Rate @ 2050

KCal/kWh, Auxiliary Power Consumption @7.79% (Average for Financial Year 2016) and Transit Loss @ 0.2%.

(c) Adverse impact on CGPL would be the difference between the cost of coal purchased by CGPL and cost of fuel recovered by CGPL on the basis of Fuel energy Charge in the PPA.

(d) Applicable Exchange Rate as per Schedule 7 of the PPA in Rs/USD (Monthly Billing).

(e) Relief for future period shall be calculated by converting the impact in USD into Indian Rupees and the said relief would be subject to truing up at the end of each Contract Year.

20. Based on the above, the Petitioner has submitted a sample mechanism/formula for calculation for computing the impact/relief on account of promulgation of Indonesian Regulations at Annexure P-4 to the affidavit dated 11.5.2016.

21. The Petitioner has submitted that though the actual heat rate could be more than 2050 Kcal/kWh (as CGPL is carrying out few modifications to its power plant to achieve this heat rate), the station heat rate of 2050 Kcal/kWh should be considered so that the impact on the Procurers and in turn, on the consumers is minimized. The Petitioner has further submitted that

auxiliary consumption as proposed by CGPL is based on the average monthly Auxiliary consumption of that year. Further, based on configuration/design of the auxiliary equipment at Mundra UMPP, the Petitioner has submitted that the normative auxiliary consumption of the Power Station is around 7.75% which was also recommended by the Technical Consultants to the Committee on Compensatory Tariff after carrying out necessary studies during Committee proceedings.

22. The Petitioner has submitted that based on the mechanism prescribed/decided/approved by the Commission, the Petitioner be permitted to raise necessary monthly bills, for the past period as well as for the future period, during the term of the PPA and till the time the impact of the Force Majeure event subsists.

Replies of the Respondents

23. GUVNL in its affidavits dated 30.5.2016, 30.9.2016 24.10.2016 and 25.10.2016 has submitted as under:

(a) The Commission may consider provisions of Article 12.7 of the PPA while assessing the impact of Force Majeure. The Commission may ascertain the base FOB price of imported coal considered by the Petitioner while placing/winning the bid (it can be FSA rate or market rate prevalent around the time of bidding) and carry out due diligence

and undertake prudence check to ascertain the quantity of imported coal affected due to the increase in Indonesian coal price.

(b) AS per the CSA dated 31.10.2008 between the Petitioner and IndoCoal, and the Assignment Agreement dated 28.3.2011 between IndoCoal, Tata Power and the Petitioner for the total tie-up of (5.85+3.51) MMTPA ± 20% coal for Mundra UMPP, the Petitioner is having 55% of 5.85 MMTPA ± 20% i.e. 3.21 MMTPA ± 20% @ USD 32/ MT upto the first anniversary of commercial operation of 1st unit escalable by 2.5% per annum for first five years only and thereafter price at par with the balance 45% of coal whereas the remaining quantum of 6.15 MMTPA ± 20% of coal (2.64 + 3.51) is available at USD 34.15/MT (as on 23.2.2007) escalating per month on pro-rata basis for part of the month as per CERC escalation rates. The Commission may consider the above submissions of the Petitioner while assessing the implication of Force Majeure subject to providing documentary proof of sourcing the entire quantum of coal from Indonesia. Further, the Commission may consider the difference between HBA index and the agreed contract price less applicable taxes and duties as increase in revenue due to impact of Indonesian Regulations for the entire quantity of 9.36 ± 20% MT per annum.

(c) The Petitioner has ignored the indexation of FoB coal price as per the FSA and is claiming the relief as difference of FoB of actual coal consumed and the fuel energy charge recovered as per PPA. Since, the fuel energy charge as per the PPA is not in line with the FSA, the Commission may consider the indexation of FoB coal price as per the FSA while assessing the impact of Force Majeure.

(d) As per the Shareholder's Agreement, the parent company Tata Power has acquired 30% stakes in the Indonesian Companies owning coal mines. The increase in HBA index has resulted in additional profitability to the Petitioners' group companies. The incremental revenue earned by the Indonesian mining companies where M/s Tata Power has stakes has not been adjusted while computing the impact of Force Majeure. The entire incremental revenue to the extent of 11 MMTPA coal needs to be adjusted while assessing the impact of Force Majeure.

(e) The Petitioner has considered the Station Heat Rate (SHR) of 2050 Kcal/kWh and Auxiliary consumption of 7.75% in the methodology proposed which are at variance with the parameters considered in the bid. The Commission in the order dated 21.2.2014 in

this Petition had considered the auxiliary consumption as 4.75% which may be considered for assessing the implication of Force Majeure.

(f) The Petitioner's request for reimbursement of interest/financial cost incurred for arrangement of additional fund from lending institutions as a consequence of increase in the coal price may not be considered as there is no such specific provision in the PPA.

24. MSEDCL in its composite written submission has submitted as under:

(a) On a harmonious reading of the PPA, the avenue available to CGPL to claim any relief under Force Majeure is limited to fulfilling debt service obligations, adjustment of capacity charges, extension of the timeline, and therefore, any variation in tariff on account of fuel cost has not been provided in the PPA.

(b) The Petitioner has submitted that CGPL has continued to perform its obligations under the PPA on account of additional equity investment and other financial support provided by Tata Power Limited. The Petitioner is stated to have incurred total debt service obligations of ₹6,514.63 crores for four financial years ending FY 2016. The Petitioner is further stated to have calculated the impact of Force Majeure clause from COD of Unit 1 till March 31, 2016 as ₹3,126 crores and from CoD of Unit 1 to June 30, 2016 as

₹3,252 crores. However, the Petitioner has not provided details to compute the impact of Force Majeure on the debt service obligations and has wrongly and exorbitantly calculated the impact of Force Majeure without providing back-up calculation.

(c) As per the CSA between CGPL and IndoCoal dated 31.10.2008 (CSA-I) for supply of 5.85 MMPTA ± 20%, the coal price of 55% of the contracted quantity (3.28 to 3.862 MMTPA) is at USD 32 per tonne with an annual escalation of 2.5% after one year of commissioning of Unit-1 at Mundra UMPP and thereafter the coal price would be same as the 45% of the contracted quantity (2.63 to 3.159 MMTPA) @ USD 34.15 per tonne escalating per month or pro rata for part of the month as per CERC Escalation Rate. Further, as per the Assignment Agreement dated 28.03.2011 (CSA-II), CGPL and Tata Power entered into an Agreement whereby 3.51 MMPTA ± 20% was assigned from Coastal Maharashtra to CGPL. The pricing of this re-assigned quantum of 3.51 MMPTA ± is USD 34.15/tonne as on 23.02.2007 escalating per month on pro-rata for part of the month as per CERC escalation rate. As per the CSAs entered into by the Petitioner and provided as per the provisions of Article 3 of the PPA, only 3.22 MMTPA of Melawan Coal out of 11.23 MMTPA of coal was with a discounted price as it was without any escalation. The balance 7.98

MMTPA of coal was at a price payable subject to CERC escalation rate i.e. at market rates. Thus, the quantum of coal consumption corresponding to non-escalable portion under CSA-I i.e. 55% of 5.85 MMTPA ± 20% may be subject relief under the Force Majeure clause.

(e) As per the Annexure IA, IB and IC furnished by the Petitioner, there are instances where the coal has been purchased from USA, Australia, Mozambique and South Africa (5,958,230 tonnes at a cost of USD 287,189,05). These sources are other than the mines of Arutmin and Kaltmin located in Indonesia and covered under the CSAs entered into by Tata Power or CGPL for Mundra UMPP. As per the Appellate Tribunal's judgement, the relief under 'Force Majeure' would be restricted to the provisions contained in the PPA and the impact of the relief should be computed with respect to Indonesian Regulations only. Therefore, increase in fuel costs for the coal sourced from locations other than Indonesia should not be passed on to the procurers.

(e) The Commission had directed CGPL to produce final invoices evidencing the purchase of coal from Indonesia. However, CGPL has submitted provisional invoices which would not be relevant for computing the relief under Force Majeure.

(f) Tata Power had quoted the parameters of heat rate at 2050 kCal/kWh and auxiliary consumption of 4.75%. Further, Tata Power had considered an escalation of 3.46% per annum for working out Fuel Energy Tariff. Tata Power has submitted that the Gross Station Heat Rate can be considered as 2121 kCal/ kWh as per the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 which is higher than the Heat Rate assumed in the bid. Further, the best available auxiliary power consumption for Mundra UMPP was 7.79% which is much higher than the assumed parameter of 4.75%. The auxiliary consumption has also increased on account of use of low GCV Coal. Both the Gross Station Heat Rate and the auxiliary consumption have resulted in the increase in the fuel consumption. On the basis of the parameters assumed in the bid by Tata Power and the actual parameters, MSEDCL has computed the difference in tariff and has found that there is an exorbitant and inadmissible reliefs claimed by the Petitioner on account of Higher SHR, Higher GCV Coal used and Higher Auxiliary Consumption which should not be allowed to be passed on to the procurers of Mundra UMPP.

(g) In the Annexure IA, IB and IC furnished by the Petitioner for the period from March, 2012 to March, 2016, the Petitioner has used the

coal having a wide range of GCV from 3,973 kCal/kg to 7,217 kCal/kg. Due to such a wide range in the quality of the coal, the SHR and the Auxiliary Consumption may also vary. The blending ratio of coal should be optimum such that balance is maintained between the efficiency of the plant and cost of procuring the coal.

(h) The parent company Tata Power Ltd has 30% stakes in the coal mines i.e. PT Kaltmin Prima Coal, PT Arutmin and IndoCoal in Indonesia through a company registered in Malaysia called Bhira Investments. Tata Power holds 100% stake in Bhira Investments Ltd. Thus, the benefits of the incremental revenue on account of increase in the price of Coal would accrue to all these three beneficiaries and the profits accruing to these three entities on account of renegotiation of Coal Supply Agreement pursuant to Indonesian Coal Regulation should be passed on to the procurers.

(i) Tata Power Limited has sold its mine in the Indonesian Coal Mining Company PT Arutmin for USD 500 million to one of the entities of Bakrie Group, promoters of Bumi Resources and has signed an option agreement for the sale of 5% stake in PT Kaltmin Prima Coal (KPC) Indonesia coal mines for USD 250 million. The gains realized by Tata Power Limited from the sale of stake in Indonesian coal mining

companies should be shared with the procurers of the project and the loss from the sale of stake in the Indonesian coal mining company PT Arutmin should not be passed on to the procurers.

(j) A notice dated 30.3.2016 was issued by Directorate of Revenue Intelligence to all the Commissioners of Customs against large importers of Indonesian Coal for resorting to over-valuation of coal while importing from Indonesia. The modus operandi was that while goods from various suppliers based in Europe, South Korea and China were shipped directly to India, import documents were routed through an intermediary entity which raised inflated invoices on the companies in India. As per the news reports, in few cases the value inflated was close to 90%. The objective of over-valuation as per the notice is two-fold i.e. siphoning off money abroad and availing higher tariff compensation based on the artificially inflated cost of imported coal.

25. PSPCL has submitted that two basic issues are required to be decided by the Commission in the present proceedings, namely, nature and extent of the Force Majeure which can be claimed by CGPL, and relief that can be granted to CGPL under the provisions of the PPA.

26. As regards the first issue i.e. the nature and extent of Force Majeure, PSPCL has submitted as under:

(a) The claim of the Petitioner on account of Force Majeure can admittedly be only on those aspects which are beyond the reasonable control of the Petitioner and which have been affected by the Indonesian Regulations. However, the claim of the Petitioner merely proceeds on the basis that the Coal Sales Agreements were at a lower cost and the Indonesian Regulations affected the Coal Sales Agreements into increasing the cost of purchase which is a Force Majeure condition which is factually incorrect.

(b) The bids were submitted by Tata Power on 7.12.2006. The Letter of Intent was issued on 25.12.2006. As on that date, admittedly there was no Coal Sales Agreement The basic contention that the bids were premised on Coal Sales Agreements at a discount is baseless as there was no agreement at the stage of bidding.

(c) The quoted energy charges by Tata Power at ₹1.38237 per unit which has been incorporated in the PPA corresponds to the landed cost of coal of about USD 70 per ton as per the exchange rate then prevalent. In other words, Tata Power as per the quoted energy charges had assumed the landed cost of coal of about USD 70 per ton. By adjusting the admitted freight and insurance cost of USD 10 per ton, the cost of coal works out to about USD 60 per tonne.

Therefore, there is no factual basis for the Petitioner to claim that the quoted tariff is based on the procurement of coal at a discounted price of USD 32 per tonne.

(d) Even as per the Coal Sales Agreement dated 30.3.2007, the capacity for CGPL was only 5.85 MMTPA ± 20% of coal. Out of the above 55% = 3.2175 MMTPA ± 20% was on the basis of escalation for 5 years @ 2.5% per annum and thereafter to be on fully escalable basis. The balance 45% (2.6325 MMTA) was on fully escalable basis, based on CERC notified escalation. Out of the balance coal under the Coal Sales Agreement dated 30.3.2007, the same was for the Coastal Maharashtra project and the Trombay project of Tata Power and the cost of coal for these projects was also on escalable basis, as per the CERC notified escalation. The coal for Coastal Maharashtra was assigned to CGPL by Tata Power vide Assignment and Restatement Agreement dated 28.3.2011 which was much after the Indonesian Regulations was enacted and with full knowledge of the prices. When Tata Power with full knowledge of the prices assigns the said CSA to CGPL with the knowledge that the quoted tariff is only 45% escalable, this commercial decision of Tata Power cannot be passed on to the consumers.

(e) Even assuming that Tata Power prudently assigned the Coal Sales Agreement to CGPL, out of the total 12 MMTA under the Coal Sales Agreement dated 30.3.2007, only 3.2175 MMTPA ± 20% was not on fully escalable basis and the balance 8.7825 MMTPA ± 20% was on fully escalable basis based on CERC escalation formula. There can be no claim whatsoever for the balance 8.7825 MMTPA ± 20% of coal, as despite having a Coal Sales Agreement for escalable coal, the quoted tariff is non-escalable. This coal is not affected by the Indonesian Regulations. The 3.2175 MMTPA works out to only 26% of the total coal requirement and even giving a cushion of ± 20%, it works out to only 32% of the total coal requirement which can be affected by the Indonesian Regulations. In the circumstances, the maximum quantum of 3.2175 MMTPA ± 20% was on non-escalable basis (escalation only of 2.5 %) and that too limited for a period of 5 years which can be considered under the Force Majeure clause and not any other aspect.

27. As regards the second issue, i.e. relief that can be granted to the Petitioner under the provisions of the PPA, PSPCL has submitted as under:

(a) The Petitioner has claimed that the clauses under which relief can be granted are Article 4.5, 12.3, 12.4, 12.7, 13.2 and 17.3 of the PPA

read with Clause 5.17 of the competitive bidding Guidelines. Article 17.3 and Clause 5.17 of the guidelines do not provide for any substantive right of relief, but only identify the forum which is to adjudicate upon the disputes. Further, Article 13.2 of the PPA applies only when there is a Change in Law and not under any other circumstances. Moreover, the Change in law has been specifically rejected by the Appellate Tribunal.

(b) Article 12.7(b) restricts the relief in relation to a Force Majeure event 'in regard to the obligations'. Article 12.7(b) does not give any right for variation in tariff or adjustment of tariff, but only deals with the relief from the obligations under the PPA. Further, Article 12.7(c) and the conditions provided in Article 12.7(d), (e) and (f) clearly exclude any liability on the part of the procurers to pay any increase in tariff in the present case as the Force Majeure event claimed by CGPL is not a natural Force Majeure event or a direct or indirect non-natural Force Majeure event within the inclusive clause contained in Article 12.3 of the PPA.

(c) The contention of the Petitioner that Article 12.7 provides for relief "including but not limited to those specified under Article 4.5" and therefore, the claim for restitutionary relief is made out, is also

misconceived. The said provision is only to clarify that the relief from the obligations of the PPA in regard to Force Majeure is not limited to Article 12.7, but all such clauses which deal with Force Majeure such as Article 4.5. But it cannot be applied to other conditions and relief which do not apply to the case of Force Majeure at all. The contentions of the Petitioner with regard to the meaning of the term 'relief' is misplaced in the present case as the relief has to be restricted to the terms of the PPA and not based on general and vague claims.

28. Rajasthan Utilities namely, Ajmer, Jaipur and Jodhpur Vidyut Vitran Nigam Limited have submitted as under:

(a) The Appellate Tribunal has restricted the relief only as per the provisions of the PPA and therefore, the issue of computation of calculation would arise only after the Petitioner satisfactorily establishes that the relief is admissible under the PPA. In the affidavit filed by the Petitioner, relief has been claimed on the basis of the provisions of Article 12.7(b) of the PPA dated 22.4.2007 entered into with procurers. Article 12.7(b) specifically restricts the relief in relation to a Force Majeure event for obligations and does not entitle the Petitioner to claim any right to increase in tariff or any restitution or being placed in the same position as if the Force Majeure event has not occurred.

(b) The Petitioner has wrongly placed reliance on the last part of the Article 12.7(b) which reads "including but not limited to those specified under Article 4.5". This only includes the relief provided under Article 4.5 which deals with extension of time for achieving the COD and has no application to situations after achievement of COD as in the present case where events relate to generation and sale of electricity after COD. Further, the term 'obligation' occurring in Article 12.7(b) cannot be extended to cover a right to recover increased tariff which is provided in a limited extent subject to the conditions in Article 12.7(c) to (g). Therefore, in the absence of any specific provision in the PPA between the parties, the effect of the Force Majeure would be only to the extent that the affected party can be released from the obligations which it cannot perform by reason of such Force Majeure. The claim of the Petitioner for compensation effective from 1.7.2012, namely, from the date of the COD of Unit No.1 alongwith interest or carrying cost is without any merit.

(c) At the time of bidding on 18.12.2006, CGPL had no CSA with any Indonesian Coal Mining Company entitling it to get coal at a price discounted from international market price prevalent at that time. The Master Coal Sales Agreement was entered into on 30.3.2007 by Tata Power and IndoCoal, an Indonesian Coal Company. Therefore, the bid

submitted by Tata Power could not have been said to be premised on the availability of coal from Indonesia at a discounted price throughout the term of the PPA and CGPL was to obtain the coal as on the date of the bidding only as per the market conditions prevalent from time to time for the entire duration of the PPA.

(d) Under the CSA entered into by Tata Power for importation of coal from Indonesia, substantial part is subject to CERC escalation norms and, therefore, there was no discounted price available to CGPL on such importation which can be said to be affected by the Indonesian Regulations benchmarking the export price to be aligned to international market prices.

(e) The Petitioner submitted two Coal Sales Agreements in respect of the coal tie-up for coal requirement of approximately 12 MMTPA. The CSA dated 31.10.2008 was between IndoCoal and CGPL for supply of 5.85 MMTPA ± 20% at buyers option having GCV of 5350 Kcal/kg with provisions for escalation for Mundra UMPP. Another CSA dated 31.10.2008 between IndoCoal and Tata Power Limited for supply and purchase of 3.51 MMTPA ± 20% at Buyers option having GCV of 5350 Kcal/kg with provisions for escalation for Dehrand Maharashtra project. The second CSA was assigned for the Mundra UMPP through a Restatement and Assignment Agreement dated

28.3.2011 after the promulgation of Indonesian Regulations in September, 2010. The CSA with the Petitioner before the Indonesian Regulation was for a quantum of 5.85 MMTPA ± 20% = 7.020 MMTPA. For the balance quantum of about 5 MMTPA, the Petitioner did not have any CSA till the promulgation of Indonesian Regulations and the Petitioner had to commercially procure such coal at the market price prevalent from time to time. Therefore, for the balance 5 MMTPA, the Petitioner cannot be said to be affected commercially on account of promulgation of Indonesian Regulations and this quantum cannot be considered for relief under Force Majeure.

(f) Tata Power had acquired 30% stake in the coal mines in Indonesia. Increase in HBA index has resulted in additional profitability of the Petitioner's group companies. Therefore, the difference between the HBA index and the agreed contract price less applicable taxes and duties should be considered as increase in revenue due to impact of Indonesian Regulations for the entire quantity of 9.36 MMTPA ± 20%. The actual profit of the Indonesian Mine on account of enactment of Indonesian Regulations needs to be shared with respect to the imported coal consumed for supply of power to the procurers.

29. Haryana Utilities vide their affidavit dated 10.6.2016 have submitted as under:-

(a) In terms of the judgment of the Appellate Tribunal, the adverse impact has to be considered only to the extent of the quantum of coal that the Petitioner had as per enforceable CSAs existing at or near about the time of biding i.e. in December, 2006 and such CSAs should provide for a right to CGPL to get coal from Indonesia at a discounted price i.e. price discounted from the prevailing market price.

(b) The CSA dated 13.10.2008 between Tata Power and IndoCoal was assigned for Mundra UMPP through a 'Reinstatement and Assignment Agreement' dated 28.3.2011 amongst IndoCoal, Tata Power and the Petitioner. Before the promulgation of Indonesian Regulations, the Petitioner had the CSA dated 31.10.2008 for 5.85 MMTPA ± 20% of the coal. The Petitioner did not have the other CSA for the balance quantum of about 5 MMTPA till the promulgation of Indonesian Regulations in September, 2010. The Petitioner had to commercially procure such coal at market price prevalent from time to time. Therefore, the Petitioner cannot be said to be affected commercially on account of the promulgation of Indonesian Regulations for 5 MMTPA of coal for the purpose of relief.

(c) The Petitioner's parent company Tata Power had acquired 30% stakes in the coal mines in Indonesia. The increase in HBA index has

resulted in additional profitability of the Petitioner's group companies. The difference between the HBA index and the agreed contract price less applicable taxes and duties should be considered as increase in revenue due to impact of Indonesian Regulations for the entire quantity of 9.36 ± 20% MMTPA. This 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 carry out due diligence and prudence check in the applicable tax and duty rate in Indonesia while assessing the impact of Force Majeure.

30. Prayas in its reply as well as the composite written submissions has made the following points with regard to the grant of relief to CGPL in terms of the remand by the Appellate Tribunal:

(a) The Petitioner has also not dealt with the specific submissions of Prayas to the effect that the Coal Sales Agreement (CSA) for the quantum in excess of 29% of the requirement cannot be a subject matter of consideration of the implication of Indonesian Regulations, as they were already subject to escalation at the CERC rate in terms of the CSAs with the Indonesian Coal Mining Companies. Further, 45% of the quoted energy charges by Tata Power Company Limited,

which form part of the Schedule 11 of the PPA provides for escalation of the coal energy charges. Since, the Petitioner has not dealt with the same, the obvious inference in law to be drawn is that CGPL has no answer to the above specific pleas of Prayas.

(b) In the present proceedings, the Petitioner is seeking to expand the scope of the remand proceedings and is proceeding on a fundamentally wrong basis that the Appellate Tribunal having held that the promulgation of Indonesian Regulations is a Force Majeure event, the monetary relief of restitution necessarily follows. This plea is further camouflaged with a moonshine argument that if no monetary relief is given to CGPL, the decision of the Appellate Tribunal will be rendered nugatory and that will amount to the Commission not implementing the orders of the Superior forum. 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 within the parameters as found in the decision of the Appellate Tribunal and (b) the relief claimed is as per the provisions of the relevant PPAs. If either of the said conditions is not satisfied, then the Petitioner is not entitled to get any relief, notwithstanding the findings by the Appellate Tribunal that Indonesian

Regulations constitute a Force Majeure event. There has to be some nexus between Indonesian Regulations being Force Majeure and the circumstances under which the Petitioner has claimed to have been affected by such Force Majeure event. The Indonesian Regulations promulgation being Force Majeure cannot support relief for situations which are unrelated to the same.

(c) As regards the condition whether the Petitioner's claim falls within the scope of specific Force Majeure event within the parameters of the Indonesian Regulations, Prayas has submitted that the implication of Indonesian Regulations can be considered only in regard to the quantum of 29% of the total annual or weighted average monthly consumption of Indonesian Coal imported subject to the maximum of 3.22 MMTPA ± 20% and for a limited period of 5 years, which the Petitioner was entitled to import from the Indonesian Coal at USD 32 per MT with escalation of 2.5% as per the CSA dated 31.10.2008. The Petitioner is not entitled to claim any relief in respect of import of any other coal under any other agreement or arrangement. Further, any savings of the Petitioner on transportation, handling and other overhead expenses factored in the bid price as well as the mining profits in Indonesia to the extent of shareholding interest of Tata Group needs to be first adjusted in order to determine

the net effect of the alleged hardship faced by the Petitioner on account of the Indonesian Regulations.

(d) As regards the relief, Prayas has submitted that the dominant expression stated in para 307 of the Full Bench judgement of the Appellate Tribunal is, 'as maybe available to them under their respective PPAs'. The Petitioner can therefore claim reliefs only as provided under the PPA and not de hors of the PPA on vague grounds of equity, restoration to same economic position, restitution etc. The relief admissible to the Petitioner, if any, has to be considered within the confines of the scope of Article 12.7 of the PPA. The plain and simple interpretation of Article 12.7 is that any relief for Force Majeure needs to be traced to Article 12.7 and the parties to the PPA did not intend to provide any other reliefs outside the scope of Article 12.7.In terms of Article 12.7(a) and (b), there cannot be any relief of 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. CGPL cannot, therefore, terminate or suspend the PPA or otherwise stop generation and supply of electricity to the Procurers. Article 12.7(c) to (g) has no application to the facts of the present case. The Petitioner does

not claim any relief under Clauses (c) to (g) of Article 12.7 and during the arguments the Petitioner has specifically restricted its claim only under Clause (b) of Article 12.7. In the circumstances, no relief is admissible to the Petitioner.

(e) The Petitioner has also wrongly placed reliance on the last part of the Article 12.7(b) which reads "including but not limited to those specified under Article 4.5". This only includes the relief provided under Article 4.5, which deals with extension of time for achieving COD. Article 4.5 has no application to situation after the achievement of the COD, like in the present case where the events relate to generation and sale of electricity after the COD. The scope of Article 12.7(b) is limited to the performance of the obligations of CGPL. The term 'obligation' cannot be extended to cover a right to recover increased tariff. This is not provided in Article 12.7 (b). This is provided in a limited extent and subject to conditions in Article 12.7(c) to (g) of the PPA.

(g) It is wrong on the part of the Petitioner to allege that the provisions of Article 12.7(b) of the PPA has not defined the term 'relief' or 'entitled to relief' and, therefore, it is open to the Commission to consider the grant of relief in a wider manner as

may be deemed fit. If the provision of Article 12.7(b) is read as a whole, namely, that 'entitled to relief in relation to Force Majeure Event, in regard to their obligations," it deals only with the release of the Petitioner from such of the obligation which could not be performed on account of Force Majeure Event and it does not deal with the ability of the Petitioner to claim any increased cost or price for the performance of the obligation.

(h) The Petitioner is also wrong in claiming that it should be restituted to the same economic position as if the promulgation of the Indonesian Regulations had not occurred and that the relief for the Force Majeure Event should be fashioned on the above basis. Such a claim of the Petitioner is not only contrary to the provisions of the PPA, but is unknown to any principle of law dealing with consequences of Force Majeure. During the arguments, CGPL had made reference to Article 12.7 (d) and (e) - last part, to the expression "in the same economic position as the Seller would have been in case the Seller had been paid the capacity charges in a situation where the direct non-natural Force Majeure Event had not occurred" as well as to Article 13 (2) which uses the expression that "the affected party to the same economic position as if such Change in Law has not occurred" and has contended

that the same principle ought to apply to the interpretation of Article 12.7 (b) of the PPA. Prayas has submitted that there is absolutely no logic or rationale in the above contention as (i) Article 12.7(b) does not deal with the right of an affected party to claim money from the non-affected party by the event of Force Majeure; (ii) the presence of such provision in Article 12.7(d) and (e) and Article 13 but not in Article 12.7(b) clearly indicates the intention not to have such an implication under Article 12.7(b); and (iii) the restoration of economic position in Article 12.7(d) and (e) is restricted to the capacity charges whereas the Petitioner is seeking much more than the capacity charges.

(h) The claim of the Petitioner for compensation w.e.f. from 7.3.2012, namely, from the date of the COD of Unit No. 1 along with interest or carrying cost is also without any merit. There cannot be any question of interest or carrying cost being paid until the amount due from the Procurer to the Petitioner is crystalized. It is well settled principle of law that in the absence of an amount being determined as due under the provisions of the PPA, there cannot be any interest or carrying cost.

(i) The monetary relief should be restricted to 29% commensurate with the quantum of coal supply which the Petitioner could purchase at discounted price (i.e. less than the prevalent market prices) under firm CSA with Indonesian Coal Mines. The monetary relief should be further restricted to the difference between the HBA index Price of the relevant grade (GCV) of coal for the concerned month and the discounted price at which the Petitioner would have been entitled to import coal from the Indonesian Coal Mines of the said grade (GCV) but for the promulgation of the Indonesian Regulations. In the documents filed with affidavit dated 9.8.2016, the Petitioner has given details of the different qualities of coal imported during the financial year 2012-13, 2013-14, 2014-15 and 2015-16. Further, as per the details given by the Petitioner at Annexure 20 of affidavit dated 9.8.2016, the categories of coal import are described as :(a) Melawan: 5400 GCV; (b) Eco Coal - 4200 GCV; (c) Satui: 6300 GCV and (d) other sources: 6300 GCV approximately. The other sources of coal import are from countries other than Indonesia such as American Coal, Columbian Coal and South African Coal. These sources cannot be said to be affected by Indonesian Regulations. On the basis of

the computation of the annual quantum of coal, monthly average and *inter se* percentage of the Melawan, Eco coal and Satui coal import from Indonesia during 2012-13 to 2015-16, Prayas has submitted that during the first two financial years, Eco Coal of about 4200 GCV constituted about 64% in 2012-13 and 66.5% in 2013-14, the Melawan and Satui Coal constituted only about 26% in the year 2012-13 and 32% in the year 2013-14. Since, for FY 2012-13 and 2013-14, more than 29% of the coal requirement came from Eco Coal of 4200 GCV, the impact of Indonesian Regulations need to be considered only with reference to 29% of the total coal import entirely with reference to Eco Coal without any consideration of Melawan Coal or Satui Coal or any other coal for the said two years. For the subsequent two years, namely FY 2014-15 and 2015-16, the Melawan coal used is 80% and 90% respectively whereas the Eco Coal used has been shown to be only 12.5% in FY 2014-15 and 0.006% in the FY 2015-16. The Petitioner has not given any explanation as to why it did not proceed with the use of higher quantum of Eco coal during FY 2014-15 and FY 2015-16, particularly in the context of the representation made by the Petitioner during the proceedings before the committee as recorded in the KPMG report of using

the blending ratio of 19-20% of Melawan and 81% of Eco Coal. If the Petitioner had proceeded to use higher quantum of Melawan Coal during FY 2014-15 and 2015-16 on its own, contrary to what was done in the immediately preceding two years as well as the representation made to the committee (as recorded in the consultant's report), the consequences have to be borne by the Petitioner and the liability on account of the same cannot be fastened on the consumers at large.

(j) The computation for August, 2013 and August, 2015 given by CGPL on the impact being simpliciter difference between quoted energy charges and HBA Index (Pages 530 - 532 of the Affidavit dated 11.5.2016) is an attempt to avoid proper prudence check and actual impact analysis which ought to be rejected in limine. Prayas has given an illustrative month-wise computation (without considering the mitigation of tax exemption) based on quantum of coal at normative parameters (of 80% PLF, 5400 GCV, 2050 SHR and Auxiliary of 4.75%) and the discounted coal quantum as 29% of normative total quantum for the period April, 2012 to April, 2016 at Appendix 'A'. Prayas has further submitted its calculation for the months of August, 2013 and August, 2015 at Appendix B and C respectively considering the methodology

adopted by the Petitioner and the quantum of discounted price coal at 29%. Prayas has further submitted that as per the illustrative calculation given in Appendix A, B and C, the total quantum of coal requirements were envisaged at 13.08 MMTPA of 5400 GCV for full load operation and 10.464 MMTPA for operation at 80% normative availability. If the coal to be imported is of the blending ratio of 80% Eco Coal (4200 GCV) and 20% Melawan (5400 GCV) to achieve the blended GCV of 4440kCal/kg, the total quantum of coal at 80% normative availability would increase from 10.464 MMTPA to 10.61 MMTPA. Prayas has submitted that the Petitioner seems to have computed the escalation representing 45% escalable at CERC escalation rate considering the Melawan Coal namely, GCV of 5400 whereas the Petitioner has imported Melawan Coal to the extent of less than 20% of the total quantum of imported coal. On the balance 25%, there is a need to do thorough prudence check on the advantage gained by CGPL by claiming escalation on 5400 GCV coal, while actually importing lower GCV Coal of 4200 GCV (Eco Coal) and such advantage of escalation on the 25% needs to be factored for adjustment while computing the impact of Indonesian Regulations. Prayas has further submitted that the

difference between the discounted price in the Coal Sales Agreement of USD 32 and the HBA index is significantly different based on the imported coal being Melawan 5400 GCV coal or the Eco 4200 GCV Coal which needs to be accounted for. Prayas has submitted an illustrative calculation of net impact at Appendix 'D' considering the blending at 80:20 of 4200 and 5400 GCV and respective HBA index; another illustrative computation for the financial year 2012-13 at Appendix 'E' about the calculation as per CERC escalation rates on 5400 GCV coal minus the escalable amount admissible for Eco Coal 4200 GCV at HBA index; and another illustrative calculation at Appendix 'F' about the net impact considering 80:20 ratio and adjustment for the gain on 25% as well as adjustment for the actual FoB being lower than the HBA index. Prayas has submitted that these illustrative computations after prudence check based on the actual data as well verification represents the correct methodology which may be considered in the event relief is to be given to CGPL.

Rejoinder of the Petitioner

31. The Petitioner in its consolidated written submissions has met the issues raised by the Procurers and Prayas as under:

(a) The present proceedings are being conducted in terms of the remand by the Appellate Tribunal and the scope of the present proceedings is strictly limited to evaluate (i) the impact of the promulgation of Indonesian Regulations on Mundra UMPP; and (ii) granting relief to CGPL as per the PPA read with the Judgment dated 7.4.2016. The scope of the present proceedings cannot be expanded to consider/permit submissions relating to issues which have already been adjudicated by the Appellate Tribunal namely, (i) Whether the promulgation of Indonesian Regulations constitutes 'Force Majeure' in terms of the provisions of the PPA; (ii) Whether CGPL had fructified Coal Sales Agreement for supply of imported coal to Mundra UMPP to meet its entire coal requirement, at a price which was below the then available market price of imported coal, and (iii) whether the competitive advantage of securing coal at lower price that CGPL was enjoying by acquiring mining rights in Indonesia, or by entering into long term Coal Sales Agreements with the coal supplier in Indonesia, has been altered/wiped out after the coal sales from Indonesia is required to be aligned with the international benchmark prices of coal due to promulgation of Indonesian Regulations.

(b) The Appellate Tribunal in the Full Bench judgement has dealt with what constitutes Force Majeure in terms of the PPA and has come to the conclusion that the Petitioner is affected by Force Majeure on account of promulgation of Indonesian Regulations. In terms of the binding directions of the Appellate Tribunal in the Judgment dated 7.4.2016, the relief to be granted to the Petitioner is with respect to the consequential adverse impact of promulgation of Indonesian Regulations on Mundra UMPP which is the difference between actual FoB cost of coal consumed by CGPL and the actual FoB value recovered by the Petitioner in terms of the PPA.

(c) Since, the Appellate Tribunal has stated that the Petitioner is entitled to a relief in terms of the provisions of the PPA read with the Judgment dated 7.4.2016, the relevant provision of the PPA, being Articles 4.5, 12.3, 12.4, 12.7, 13.2 and 17.3 need to be considered for granting relief. Articles 12.7 and 17.3 of the PPA constitute the foundation for grant of relief on account of Force Majeure event, as held by the Appellate Tribunal in the Judgment dated 7.4.2016. Article 12.7(b) is an inclusive clause which envisages that an affected party is entitled to a relief, including but not limited to extension of time under Article 4.5 of the PPA. The

relief provided in Article 12.7 of the PPA is not an exhaustive list but is merely illustrative. Article 12.7(b) is an inclusive clause and does not restrict the scope of relief to the other illustrative reliefs set out in Article 12.7(c) to 12.7(f). Since, Force Majeure, by its nature, is an event which is unforeseeable, the parties have not restricted the scope of relief under Article 12.7(b). Accordingly, flexibility is given to the Appropriate Commission to mouldor fashion a relief in the facts and circumstances of the case. Article 12.7(b) of the PPA contemplates the reliefs available to an Affected Party in the event of Force Majeure which would mitigate the effect of Force Majeure event (including but not limited to relief under Article 4.5); provide an ameliorative relief to the Affected Party suffering from the Force Majeure event; and any other relief, to be moulded or fashioned by this Commission, as per the facts and circumstances of the case. Provision of Change in Law under the PPA is one of the facets of the provision of Force Majeure (under the PPA). The provision relating to Change in Law provides that the party affected by Change in Law is entitled to a relief which restores the Affected Party to the same economic position as if such Change in Law event had not occurred. Therefore, the

relief of restitution is implied in Article 12.7(b) of the PPA in the facts of the present case.

(d) The Commission is required to give meaning to the term 'relief' used in Article 12.7(b). Article 12.7(c) to (f) of the PPA provides for the illustrative reliefs which are quantified for certain circumstances which neither exhausts nor controls the entire ambit of the relief that an Affected Party is entitled to. The explicit language of Article 12.7 and 17.3 of the PPA empowers the adjudicating body to mould appropriate relief which would negate the impact of the Force Majeure event such that the parties can continue to perform their obligations under the PPA for the entire tenure. Given the long-term nature of the PPA, the PPA provisions are intended that relief for Force Majeure is to restore/restitute the bargain, agreed by the Affected Party as at the time of bid, which has been eroded by Force Majeure, to ensure that an affected party can continue to perform its obligations under the PPA. While restituting a party to the same bargain as if the Force Majeure events had not occurred, the courts have to take a pragmatic view and grant relief in a manner as may be reasonable, fair and practicable without causing unwarranted hardship to either of the parties. The grant of restitution is to meet the ends of justice. The

courts have an inherent power/jurisdiction to order restitution so as to do complete justice between the parties.

(e) As regards the respondent's objections regarding the scope of relief under the PPA, the Petitioner has submitted that the same is based on an erroneous interpretation of the provisions of the PPA and Full bench judgement. As regards the respondents' submission regarding the relief of termination not being available to the Petitioner in view of the Supreme Court judgement, the Petitioner has submitted that CGPL has never sought for the termination/suspension from performance of its obligations under the PPA which is evident from the prayers sought by CGPL in its Petition No. 159/MP/2012. Further, CGPL had also submitted before the Appellate Tribunal that the intent of the PPA was to continue supply of electricity to the Procurers and not to disrupt the supply. It is in this light that the provisions of Change in Law and Force Majeure were included in the PPA, i.e. to protect the parties to the PPA from any unforeseen eventuality which is beyond their control. Therefore, the scope of Article 12.3 read with 12.4 and 12.7 of the PPA is broader than the scope of Section 56 of the Indian Contract Act. Article 12.7(b) of the PPA is to be interpreted to provide relief for all eventualities which were beyond the control

of the parties and any other interpretation would make Article 12.7 of the PPA a dead letter. As regards MSEDCL's submission that relief cannot be granted on the total rise in price of coal but only with respect to increase in price of coal due to promulgation of Indonesian Regulations, the Petitioner has submitted that MSEDCL is indirectly questioning the Appellate Tribunal's finding that promulgation of Indonesian Regulations amounts to Force Majeure event. As regards MSEDCL's submission that allowing pass through of additional cost incurred by CGPL would amount to converting Section 63 process into Section 62 process, the Petitioner has submitted that any increase in tariff, in terms of the relief under the PPA does not convert a Section 63 PPA into a Section 62 PPA.

(f) As regards the Respondent's submissions that the Petitioner has not dealt with the submission relating to Coal Sales Agreement, the Petitioner has submitted that it has replied to Prayas that the submissions qua Coal Sales Agreement cannot be raised in the present proceedings as it is barred by the principles of *res judicata*. With regard to the Respondent's submissions that only 29% of the total quantum of coal required for Mundra UMPP is affected by promulgation of Indonesian Regulations and that too

only for first 5 years, the Petitioner has submitted that the said argument is beyond the scope of the present remand proceedings and is barred by the principles of *res judicata* since the submissions relating to Coal Sales Agreement and escalable and non-escalable component in tariff were made, considered and rejected by the Appellate Tribunal in Paras 293, 295, 300 and 301 of the Judgment dated 7.4.2016. The Petitioner has submitted that the pricing of Coal Sales Agreement, including the execution date of the Assignment and Restatement Agreement has no relevance for computation of relief for Force Majeure as the Indonesian Regulations have completely altered/wiped out the Coal Sales Agreements executed (and the possibility of executing the balance requirement so as to align itself to the Bid Tariff). The Petitioner has submitted that the price, discount, structure of the PPA like escalable and non-escalable as agreed in original Coal Sales Agreements were completely altered by the Indonesian Regulations.

(g) Respondent's submissions that this Commission should use the base price mentioned in the Coal Sales Agreements to assess the impact of force majeure on Mundra UMPP is flawed and contrary to the Appellate Tribunal's Judgment dated 7.4.2016 as

the Appellate Tribunal has neither directed nor permitted the Commission to go beyond the PPA and to conduct an enquiry into the Coal Sales Agreement. Since, the PPA is premised on the bid tariff, the relief which ought to be granted to the Petitioner is the difference between actual FoB cost of coal consumed by CGPL and the actual FoB value recovered by CGPL in terms of the PPA. Accordingly, the Petitioner has computed the losses/adverse impact suffered by it for the past period and calculation for the future period on account of promulgation of Indonesian Regulations. The Petitioner has, by its Affidavits dated 30.06.2016 and 9.8.2016, has placed on record the (a) Month-wise coal consumption quantity, its value along with shipment-wise purchase quantity, GCV value of coal, FoB cost of purchase of coal, for the period from March, 2012 till June, 2016 based on the Certificates issued by the Statutory Auditors; (b) Computation of relief to be granted under the Force Majeure for the period commencing from March, 2012 till June, 2016; (c) Monthly Certificates issued by the Statutory Auditors based on Audited Financial of CGPL, certifying the quantity of coal consumed, corresponding FoB value, quantity of coal purchased and Gross

Calorific Value for the period commencing from March, 2012 till June, 2016.

(h) As regards the Respondent's submissions that coal procured from sources other than the fructified Coal Sales Agreements should not be considered for the purpose of computation of relief for Force Majeure, the Petitioner has submitted that the Petitioner in its Affidavit dated 9.8.2016 has placed on record the entire quantum of coal procured by it including the GCV of the said coal. The Petitioner has admitted that, it has, on a one-off occasion, procured low GCV/high GCV coal from countries other than Indonesia (distress spot sales), the primary reason for procuring low GCV coal from countries other than Indonesia being the availability of preferential rate in such countries. The low GCV coal was used by the Petitioner for the purposes of blending. For usage of low GCV coal, the Petitioner has also incurred additional ocean freight and fuel handing cost which has not been claimed under the proposed mechanism of relief submitted vide affidavits dated 11.5.2016 and 9.8.2016. Therefore, the additional cost on account of freight and fuel handling is absorbed by the Petitioner. This was done by CGPL, as a prudent utility, to mitigate the losses incurred by it due to promulgation of Indonesian Regulations.

(i) As regards the respondents' submission regarding KPMG report that discounted price is available on 3.22 MMTPA quantum of coal and the remaining quantum is linked to market price of coal, the Petitioner has submitted that KPMG Report does not state that the non-escalable component of Coal Sales Agreement (i.e. 3.22 MMTPA @ 32$/ton) was at discounted price and balance quantity (escalable) (i.e. 8.01 MMTPA @ 34.15$/ton) was not available at discounted price. The Petitioner has submitted that the Report only gives the break-up of non-escalable quantity and escalable quantity as per Coal Sales Agreements executed by CGPL. The Petitioner has submitted that the Appellate Tribunal in its Judgment dated 7.4.2016 has held that the escalable and non-escalable component of tariff has been completely wiped out as a result of promulgation of Indonesian Regulations. As regards the Respondents submission regarding import of 0.993 MMTPA of Melwan Coal for FY 2012-13, the Petitioner has submitted that, four Units of Mundra UMPP [i.e. Unit Nos. 20 to 50] were under commissioning during FY 2012-13 and therefore, a limited quantum of coal was procured by the Petitioner. Further, coal of 4200 GCV was used for blending on trial basis and to reduce the burden of cost of coal being imported coal by the Petitioner. As

regards the Respondents' submission that FoB Price of imported coal is less than HBA Index as per KPMG report, the Petitioner has submitted that the KPMG report clearly states the said difference is on account of deviation in coal properties like heating value, sulphur and ash contents. There is a price adjustment formula prescribed in HBA Index notification for any deviation/variation in coal properties/characteristics. In other words, the published HBA Index is for standard quality of a particular type of coal and any deviation in properties/characteristics is adjusted in HBA Index i.e. price of coal billed.

(j) As regards the Respondents' submission that the Indonesian Regulations providing for fixation of the benchmark price for export of coal is traceable to Articles 4 and 5 of the Mining Law No. 4 dated 12.1.2009 and the Government of Indonesia Regulations No. 23 of 2010 dated 1.2.2010 containing enabling provisions relating to production and sale of coal, including that the export of coal is to be guided by the coal benchmark price and therefore, the source of coal identified after 1.2.2010 is not affected by Indonesian Regulations, the Petitioner has submitted that the issue whether the promulgation of Indonesian Regulations was

unforeseen and amounts to Force Majeure has already been decided by the Appellate Tribunal in its Judgment dated 7.4.2016 and the same cannot be re-agitated in the present proceedings. The Petitioner has further submitted that the Mining Law No. 4 came into force with effect from 12.1.2009, i.e. after the Bid Deadline of 30.11.2006, and the execution of the Master Coal Sales Agreement dated 30.3.2007 between Tata Power and IndoCoal for 10.11 MMTPA ± 20% of coal (12.132 MMTPA) and Balance Coal Sales Agreement between CGPL and Tata Power. The said Mining Law nowhere directs that there cannot be any export of coal below the market price and therefore, reliance on the said law by Prayas is irrelevant.

(k) As regards Prayas submission regarding sample calculation, the Petitioner has submitted that Prayas has taken different approaches in case of Adani Power Limited and CGPL as the energy charges quoted by Adani is fully non-escalable whereas the energy charges quoted by CGPL is partly escalable and partly non-escalable. Prayas has suggested that relief for Force Majeure in case of CGPL should be computed on the basis of difference between FoB cost of coal procured by CGPL and FoB price derived as per the Coal Sales Agreement executed between the

CGPL and the Indonesian mining companies whereas in case of APL, Prayas has calculated the impact of Force Majeure on the basis of FoB cost of coal procured by Adani Power and FoB cost of coal based on the energy charges quoted in the PPA. The Petitioner has submitted that the nature of tariff cannot be the basis for adopting two divergent manners of computation. The Petitioner has submitted that Coal Sales Agreement cannot be considered as basis for determining relief for Force Majeure for CGPL since due to the Indonesian Regulations, CGPL was not able to tie up its coal requirement is a manner which would align the cost of coal with quoted Fuel Energy charges under the PPA. The Petitioner has submitted that the best mode of calculating the relief for Force Majeure is by calculating the difference between the FoB cost of coal procured by CGPL and FoB cost of coal recovered against the energy charges quoted in the PPA. The Petitioner has submitted that in terms of the judgement of the Appellate Tribunal to assess the impact of Force Majeure and grant such relief to CGPL in accordance with the PPA read with the judgement, the methodology/philosophy to be used for determining the impact of Force Majeure should be similar to the

earlier methodology adopted by the Commission in the order dated 21.2.2014.

(l) As regards MSEDCL's submission that promulgation of Indonesian Regulations does not amount to Force Majeure in terms of the PPA, the Petitioner has submitted that MSEDCL is seeking to challenge/reopen the Appellate Tribunal's judgement before this Commission which is not permissible. As regards the MSEDCL's submission that no relief should be granted till the Civil Appeal filed by MSEDCL is disposed of by the Hon'ble Supreme Court, the Petitioner has submitted that Hon'ble Supreme Court has neither stayed the judgement dated 7.4.2016 and/or the present remand proceedings. On the other hand, Hon'ble Supreme Court has directed the parties to file the copy of the order passed by the Commission before the Hon'ble Supreme Court and the order of the Commission can be implemented only after appropriate orders are passed by the Hon'ble Supreme Court.

(m) In response to the submissions of the respondents that additional income earned by the Indonesian coal companies due to selling of coal at a price higher than the CSA quoted price (after deducting royalties and taxes), where the Petitioner's group

company holds substantial stake, and the benefits earned by CGPL in transportation and handling charges, should be adjusted in calculating the relief, the Petitioner has submitted that there is no provision in the PPA for any such adjustment relating to mining profits, transportation, forex and other handling charges etc. and therefore, no deduction qua the increase in Indonesian mining companies ought to be allowed while computing the relief of Force Majeure . The Petitioner has submitted that as a goodwill gesture, its holding company, namely Tata Power, is agreeable to offer incremental dividend and/profits (after adjusting Taxes, Duties, Cess etc.,) earned by it from actual sale of coal to Mundra UMPP. The Petitioner has clarified that the incremental dividend/profits received by Tata Power in India (30%) prorated to actual Mundra off-take is to be adjusted to reduce the burden of additional tariff on the Procurers. The Petitioner has submitted that Tata Power holds only 30% equity in the Indonesian coal mining companies for a total equity investment of approximately USD 1.2 billion, which has not been included by CGPL in its fixed charges/energy charges while quoting the tariff for Mundra UMPP. This was a separate investment made by CGPL's holding company, keeping in view of the expansion plan/other business consideration. The

sale of coal by the Indonesian mining companies to Mundra UMPP is small fraction of total sales of the mining company and therefore 30% dividend received by Tata Power is not entirely attributable to the sale by mining company to Mundra UMPP. The dividend received by Tata Power from its investment in the mining companies is used to service debt taken by it to make its equity investment in the said mining companies. Since, the return of Tata Power from its investment, either by way of income from dividend or from profits, is limited to 30% of the total dividend/profit declared by the mining companies after adjusting Royalty, additional fuel cost, Taxes, Duties, Cess etc., there is no rationale for seeking adjustment/ sharing of the entire dividend/ profits from the mining companies with the Procurers. The Petitioner has further submitted that the coal off-take agreement of Tata Power is only limited to the Coal Sales Agreement for Mundra UMPP which is 9.36 ± 20% MTPA. Therefore, the dividend/profits received by Tata Power in India pertaining to actual Mundra off-take can be adjusted against the relief to be given to CGPL.

(n) In response to MSEDCL's submission regarding the sale of stakes in Indonesian mining company by Tata Power and passing on such benefits to the procurers, the Petitioner has submitted that

CGPL has predominantly procured Melwan Coal for Mundra UMPP from KPC mines. Though CGPL has also, in the past, procured Eco Coal (since February 2011) from Artunim on spot contract basis, as and when available to mitigate the adverse impact of promulgation of Indonesian Regulations on Mundra UMPP, CGPL has, with effect from March 2014, discontinued procurement of Eco Coal from Arutmin as the same has resulted in plant in-efficiencies, higher operating and maintaining expenditure and adverse impact on useful life of the equipment. The Petitioner has submitted that the proposed sale as reported by Newspapers relates to Arutmin mines and not for KPC mines. Since CGPL is no longer procuring coal from Artumin mines, it sold its stake in Artumin mines. The Petitioner has submitted that MSEDCL's submission has no relevance in the facts of the present case.

(o) In response to MSEDCL's submission during the hearing that as per the Notification of Directorate of Revenue Intelligence regarding investigation initiated against the generating companies importing coal from Indonesia on account of over-invoicing and the Commission should seek necessary information from DRI and CGPL in order to ensure that no additional benefit is passed on to CGPL, the Petitioner has submitted that DRI's Notification dated

30.3.2016 providing a list of generating companies against which investigations are being conducted by DRI does not include the name of CGPL. As regards the DRI investigation, the Petitioner has submitted as that: (i) On 28.10.2015, the Office of the Principal Commissioner of Customs, Mundra, Gujarat issued letters to DRI, Gandidham and DRI, Mumbai, seeking a confirmation if any investigations are pending against CGPL as regards its import of coal from Indonesia. (ii) On 10.12.2015, DRI, Gandidham replied to Office of the Principal Commissioner of Customs' letter dated 28.10.2015, confirming that no investigation is pending against CGPL. (iii) On 30.3.2016, DRI issued a notification where CGPL's name is not included in the said investigation. (d) On 11.4.2016, DRI Jamnagar issued a letter to Deputy Commissioner of Custom, Mundra confirming that no case relating to investigations except relating to classification of coal as steam coal or bituminous coal, is pending before it. The Petitioner has submitted that no investigations by DRI Gandidham and/or DRI Jamnagar are pending against CGPL.

(p) In response to Prayas submission that the impact of promulgation of Indonesian Regulations should be restricted to29% of total requirement of coal for Mundra UMPP, the

Petitioner has submitted that the impact of promulgation of Indonesian Regulations is for the entire quantum of coal for Mundra UMPP and not for the 29% of the total quantum of coal. As regards Prayas submission that the monetary relief should be further restricted to the difference between the HBA price of the relevant GCV of coal for the concerned month and the discounted price at which CGPL would have been entitled to import coal from Indonesian Mines for the said grade, the Petitioner has submitted that relief is to be granted to restitute CGPL to the extent of the actual hardship, i.e., difference between the actual FoB cost of coal consumed by CGPL and the actual FoB value recovered by CGPL in terms of the PPA for the past period as well as for the future period.

(q) As regards Prayas's submissions that the calculations proposed by the Petitioner for the relief for future period is based on HBA Index whereas the calculations proposed by CGPL for the past period is not based on HBA Index, the Petitioner has submitted that, CGPL had procured different GCV of coal (other than Melawan Coal) from different sources (other than Indonesia). Therefore, for the past period, CGPL has considered actual FoB cost of coal consumed whereas for future its proposal is based on

HBA Index. The Petitioner has submitted that the actual coal consumption is based on the certificate issued by Statutory Auditors prepared based on Audited financials.

(r) As regards Prayas's submissions that CGPL has computed escalation representing 45% escalable at CERC escalation rate considering Melwan Coal whereas the import of Melawan is less than 20%, the Petitioner has submitted that its proposal is based on the Energy Charges as per Schedule 7 to PPA and accordingly, the Petitioner in the proposed computation has applied CERC escalation on escalable component of tariff and Nil escalation on non-escalable component of tariff. The Petitioner has submitted that by applying the above CERC escalation, the actual FoB cost recovered through PPA tariff is determined. This FoB cost is compared with actual FoB cost of consumption for past period (and HBA for future period) to work out the Force Majeure hardship.

Analysis and Decision

32. The present petition has been taken up for consideration consequent to the setting aside of the orders dated 15.4.2013 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 PPA 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 MSEDCL, Rajasthan Utilities, Haryana Utilities, PSPCL and GUVNL, and Consumer Group, namely, Prayas Energy Group participated. The matter was argued at length by learned Senior Counsel for the Petitioner and learned counsels for the Respondents and Prayas. The detailed submissions of the parties during the hearings, in the written submissions, replies, rejoinders and written submissions have been extensively discussed in the preceding paras of this order. Based on pleadings and documents 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 of the Appellate Tribunal under which relief can be granted to the Petitioner;

(III) Coal Sales Agreements entered into by the Petitioner regarding imported coal which are affected by force majeure event of Indonesian Regulations;

(IV) Operational Parameters for working out the relief;

(V) Computation of relief for Force Majeure on account of Indonesian Regulations;

(VI) Sharing of profit from mines owned by the Holding Company of the Petitioner, Tata Power, in Indonesia;

(VII) Invoices of coal imported from Indonesia

(VIII) Carrying cost

I. SCOPE OF REMAND

33. The Appellate Tribunal has remanded the Petition 159/MP/2012 in terms of the following observations/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."

34. 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. However, the parties differ with respect to the scope of the remand. Prayas has submitted in its consolidated written submission dated 22.8.2016 that the present proceedings before the Commission is on a limited remand and is not open ended for de novo consideration of the entire matter. 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 by the Appellate Tribunal, monetary relief of restitution necessarily follows and if no monetary relief is given to the Petitioner, the decision of the Appellate Tribunal would be rendered nugatory and that will amount to not implementing the judgement of the superior forum. Prayas has submitted that there should be some nexus between Indonesian Regulations being Force Majeure and the circumstances under which CGPL has claimed to have been affected by such Force Majeure events. According to Prayas, the dominant aspect to be considered is whether the Petitioner could have continued to procure the coal at the negotiated/discounted/reduced price but for the Indonesian Regulations

having come into force and the consideration of Force Majeure cannot extend to the quantum of coal under any other CSA or FSA or procurement which does not satisfy or provide for any negotiated reduced price less than the prevalent market price. Learned Senior Counsel for MSEDCL submitted during the hearing that declaration of Force Majeure by the Appellate Tribunal was with respect to Adani Power Limited and not with respect to the Petitioner. The Commission is therefore required to determine (i) whether rise in price of fuel amounts to Force Majeure under the provisions of the CGPL PPA?; (ii) whether the case of Force Majeure is made out by the Petitioner in the facts and circumstances of the present case?; and (iii) whether relief, if any, is available under the PPA?; (iv) if the reply is in the affirmative, then the Commission shall assess such relief and grant the same to the Petitioner. Other Procurers have submitted that the relief should be granted to the Petitioner strictly in terms of the PPA. The Petitioner on the other hand has submitted that the scope of the present proceedings cannot be extended to consider/permit submission of the issues which have already been adjudicated by the Appellate Tribunal, namely, (a) whether the promulgation of Indonesian Regulations constitutes 'Force Majeure' in terms of the provisions of the PPA; (b) whether the Petitioner had fructified Coal Sales Agreement for supply of imported

coal to Mundra UMPP to meet its entire coal requirement, at a price which was below the then available market price of imported coal; (c) whether the competitive advantage of securing coal at lower price, that the Petitioner was enjoying by acquiring mining rights in Indonesia, or by entering into long term Coal Sales Agreements with the coal supplier in Indonesia, has been altered/wiped out after the coal sales from Indonesia is required to be aligned with the international benchmark prices of coal due to promulgation of Indonesian Regulations; and (d)whether the promulgation of Indonesian Regulations impacted the procurement of coal by the Petitioner and ultimately the price of supply of power to the procurers. The Petitioner has submitted that the scope of remand proceedings before this Commission is limited to evaluate the impact of the promulgation of Indonesian Regulations on Mundra UMPP and granting relief to CGPL as per the PPA read with the judgement dated 7.4.2016.

35. 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 the relief for Force Majeure. 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 under the tariff based competitive bid process under Section 63 of the Act has laid out 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……"

36. 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 has been made out in favour of the Petitioner. After considering the provisions of the PPA 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 PPA or clause 4.7 of the Competitive Bidding Guidelines issued by the Central Government under Section 63 of the Electricity Act, 2003should not be construed to include laws other than Indian Laws such as the Indonesian Laws/Regulations prescribing benchmark price for the export of coal.

37. The Appellate Tribunal after examining the facts surrounding CGPL's PPA dated 22.4.2007 with the procurers of the States of Gujarat, Maharashtra, Punjab, Haryana, and Rajasthan came to the conclusion that "in so far as CGPL is concerned, admittedly, the PPA is

based entirely on imported coal from Indonesia". Further, the Appellate Tribunal examined certain provisions of the PPAs e.g. Article 12.1 (definition of Force Majeure), 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). The Appellate Tribunal came to the conclusion about the scope of Force Majeure under Article 12.3 of the PPA 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 recognizes 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."

38. 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) in the present case 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."

39. The Appellate Tribunal examined the provisions of Article 12.3 (excluding Article 12.3.1 and Article 12.3.2), Article 12.4 and Article 12.7(a) and observed that the provisions of these articles in the PPA which contemplate Force Majeure are wider than the scope of Section 56 of the Indian Contract Act which deals with agreement to do impossible act and its consequence. 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 PPA 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 PPA, 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."

40. 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 those 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 fulfillment 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."*

41. The Appellate Tribunal conclusively held that the Petitioner has been affected by Force Majeure and is entitled for relief as available under the PPAs. Relevant paras of the judgement is 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 fulfil 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."

42. 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 PPA came to the conclusion that change in fuel price if it is not within the control of the parties 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 for Force Majeure clauses in the PPA is to save the performing party from the consequences of anything over which it has no control. After considering the events surrounding the Coal Sales Agreements entered into by the Petitioner for procuring coal from Indonesia at discounted price to meet its obligations to supply power to the procurers under the PPA and further noting that Indonesian

Regulations being an act of sovereign was beyond the control of the Petitioner, the Appellate Tribunal has recorded the findings that: (i) the Indonesian Regulations impacted the economy of the Petitioner; (ii) the Petitioner had to pay exorbitantly high cost for import of coal from Indonesia making the fulfilment of its contractual obligations 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. The Appellate Tribunal came to the conclusion that the Petitioner had fructified coal sales agreements for procurement of coal for Mundra UMPP at a price less than the market price and the competitive advantage which the Petitioner was enjoying by acquiring mining rights in Indonesia or by entering into term Coal Sales Agreement appears to have been fundamentally altered/wiped out after the coal sales from Indonesia were required to be aligned with the international benchmark prices of coal. Another pertinent observation of the Appellate Tribunal is that the Procurers and Consumer organisations have not been successful in controverting the case of CGPL. In other words, the Appellate Tribunal has rejected the submissions of the Respondents and Prayas that Indonesian Regulations aligning the coal prices in the concluded CSAs

with the benchmark price is not an event of Force Majeure affecting the Petitioner in terms of the PPA.

43. 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 after promulgation of 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 on account of promulgation of Indonesian Regulations in case of the Petitioner, the scope of the remand before the Commission

does not extend to the determination of the issue (i) whether the Indonesian Regulations constitutes Force Majeure and (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.

44. 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 PPA 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 under which relief shall be granted to the Petitioner on account of Force Majeure arising out of the promulgation of Indonesian Regulations; (ii) the assessment of the impact of Force Majeure event on the price of coal used at Mundra UMPP for supply of contracted capacity and scheduled energy to the Procurers under the PPA; and (iii) granting relief for such Force Majeure event keeping in view observation/analysis of the Appellate Tribunal and in accordance with the PPA.

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

45. The Petitioner has submitted that as per the judgement of the Appellate Tribunal, CGPL is entitled to relief in terms of the provisions of the PPA read with the Full Bench Judgment dated 7.4.2016. The Petitioner has submitted that the relevant provisions of the PPA, namely, Articles 4.5, 12.3, 12.4, 12.7, 13.2 and 17.3 ought to be considered in this regard. The Petitioner has based its claims for relief on the various provisions of the PPA as under:

(a) Articles 12.7 and 17.3 of the PPA are the foundations for grant of relief on account of Force Majeure event, as held by the Appellate Tribunal in the Full Bench Judgment dated 7.4.2016. Since, the case of Force Majeure has been made out by the Petitioner, the Commission can exercise its adjudicatory power to grant/fashion a relief as required in the facts and circumstances of the present case.

(b) Article 12.7(b) is an inclusive clause which envisages that an affected party is entitled to a relief, including but not limited to extension of time under Article 4.5 of the PPA. The reliefs provided in Article 12.7 of the PPA are not an exhaustive list but are merely illustrative.

(c) Article 12.7(b) does not restrict the scope of relief to the other illustrative reliefs set out in Article 12.7(c) to 12.7(f) of the PPA. Considering the fact that Force Majeure, by its nature, is an event which is unforeseeable, the parties have not restricted the scope of relief under Article 12.7(b) and accordingly, flexibility has been given to the Commission to mould or fashion a relief in the facts and circumstances of the case.

(d) Provision of Change in Law under the PPA is one of the facets of the provision of Force Majeure which provides that the party affected by Change in Law is entitled to a relief which restores the Affected Party to the same economic position as if such Change in Law event has not occurred. Therefore, the relief of restitution is implied in Article 12.7(b) of the PPA, in the facts of the present case.

(e) Due to intervention of Force Majeure event, the Petitioner's contractual obligation towards the Procurers to supply power at PPA tariff has become commercially impracticable. Therefore, the relief is to be granted with regard to the obligation which has become commercially impracticable, i.e. relief which would make the PPA workable/commercially practicable.

(f) While restituting a party to the same bargain as if the Force Majeure events have not occurred, the courts have to take a pragmatic view and grant relief in a manner as may be reasonable, fair and practicable without causing unwarranted hardship to either of the parties. The Commission has the inherent power/jurisdiction to order restitution so as to do complete justice between the parties.

(g) The Commission can also invoke the principles under Section 70 of the Contract Act as the Petitioner has been continuously and consciously supplying power to the Procurers despite continuing Force Majeure Event. The Petitioner deserves to be compensated for such supply after taking into account the impact of Force Majeure.

(h) While computing the relief to be granted to CGPL, the Commission may also seek parity with the principles of compensation under the Indian Contract Act and common law principles, particularly the principles governing the grant of compensation and/or damages under Sections 73 to 75 of the Indian Contract Act.

(i) The Hon'ble Supreme Court has held in a number of cases that in exercise of its plenary jurisdiction, a court has the discretionary power to mould a relief or give such relief, as the parties may be

found to be entitled to in equity and justice. Therefore, this Commission has the power to mould the relief to meet the ends of justice.

46. The Respondents have submitted the following with regard to the scope of relief available to the Petitioner under the PPA to mitigate the impact of Force Majeure Event as under:

(a) Relief to be granted to the Petitioner is restricted to Article 12.7 of the PPA. Article 12.7 of the PPA does not provide for any relief of compensation.

(b) Scope of Article 12.7(b) is limited only to granting a relief to a party from performing its obligation under the PPA. Article 12.7(b) does not provide for granting a relief for claiming any additional amount/increase in energy charges. The reliefs under Article 12.7(c) to (g) have no application in the facts of the present case. Therefore, no relief is available to CGPL under the PPA.

(c) The Petitioner cannot seek termination/suspension of the PPA and/or stop generation of electricity, as the same has been barred by the Hon'ble Supreme Court by its order dated 31.3.2015 in Civil

Appeal No. 10016 of 2014 titled as Adani Power Limited v. CERC &Ors.

(d) Relief, if available, is restricted to meeting the sellers' debt service obligations. CGPL has not defaulted in its debt service obligations and hence, no relief is admissible.

(e) Relief contemplated under provisions for Force Majeure is different from the relief contemplated for Change in Law. CGPL is virtually seeking a relief under Change in Law, which has been rejected by the Appellate Tribunal.

(f) Reliance cannot be placed on Section 73 to 75 of the Contract Act to grant relief to CGPL as the claim under the said Sections is based on the principles of award of damages for breach of the contract. The claim for relief against Force Majeure is not for breach on account of failure or default by the Procurers and CGPL becoming entitled to claim compensation as a non-defaulting party from a defaulting party.

(g) HBA index is a composite index of Indonesian and Australian Coal Index. The variation in price of coal is not directly linked to promulgation of Indonesian Regulations. Therefore, relief cannot

be granted on the total rise in price of coal, but the same is to be granted only with respect to increase in price of coal due to promulgation of Indonesian Regulations.

(h) Allowing pass through of additional cost incurred by CGPL due to promulgation of Indonesian Regulations would amount to converting Section 63 process into Section 62 process. This would also affect the sanctity of bidding process.

47. The Petitioner has submitted that the Respondent's contentions are based on the erroneous interpretation of the Appellate Tribunal's Judgment dated 7.4.2016 and the provisions of the PPA. As regards the submission that relief of termination is not available to CGPL, the Petitioner has submitted that CGPL has never sought for the termination/suspension from performance of its obligations under the PPA which is evident from the prayers sought by CGPL in its Petition No. 159/MP/2012 and the submissions before the Appellate Tribunal. The Petitioner has submitted that Article 12.7(b) of the PPA is to be interpreted to provide relief for all eventualities which were beyond the control of the parties and any other interpretation would make Article 12.7 a dead letter. As regards the submission that allowing pass through of additional cost incurred by the Petitioner would amount to converting

Section 63 process into Section 62 process, the Petitioner has submitted that it is seeking relief in terms of the statutory framework read with the Appellate Tribunal's Judgment dated 7.4.2016 and this would not amount to converting Section 63 into Section 62 process under the 2003 Act.

48. 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 PPA and in the light of the judgement. Article 12.7 of the PPA dated 22.4.2007 deals with the relief available for the Force Majeure event. Article 12.7 reads 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) 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;
>
> (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 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, relatable to such Unit, which are due under the Financing Agreements, subject to a maximum of Capacity Charges based on Normative Availability, 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 CERC 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 Procurers 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 been commissioned, and (b) only if in the absence of such Indirect Non Natural Force Majeure Event, the availability of such commissioned Unit(s) 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 by 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 Non Natural Direct Force Majeure in the form of an increase in Capacity Charge. Provided such capacity charge increase shall be determined by CERC 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/s 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, as per Article 8.1 of the Unit(s) Commissioned earlier and now affected by Direct or Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer/s). Where such testing is possible to be undertaken in spite of the Direct or Indirect Non Natural Force Majeure Event (Natural Force Majeure Event affecting the Procurer/s), and the Independent Engineer accepts and issues a Final Test Certificates certifying such Unit(s) being capable of delivering the Contracted Capacity and being Available, had there being no such Direct or Indirect Non Natural Force Majeure Event (or Natural Force Majeure Event affecting the Procurer/s). 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/s), then the Procurer/s shall make pro-rata payment of Debts 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 Procurers 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/s) shall also be adjusted pro-rata for reduction in Available Capacity;

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

(h) For avoidance of doubt, it is specified that the charges payable under this Article 12 shall be paid by the Procurers in proportion to their then existing Allocated Contract Capacity."

49. 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 PPA. Clauses (c) to (g) of Article 12.7 deal with the reliefs when the project is affected by Natural Force Majeure Event and Non Natural Force Majeure Events. Since, the project of the Petitioner is neither affected by Natural Force Majeure Events or Non Natural Force Majeure Events, these provisions have no application 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 unambiguous 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.

50. Prayas in its Composite Written Submission 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 reliefs for Natural and Non Natural Force Majeure Events which are enumerated in Article 12.3.1 and Article 12.3.2 of the PPAs. In our view, 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 procurers, 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 Article 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) that wholly or partly prevents or unavoidable delays an Affected Party in the performance of its obligations under the PPA. 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 even do not specifically fall under Natural and Non-Natural Force Majeure Events but such events and circumstances wholly or partially prevent or delay the Affected Party in the performance of its obligations. Article 12.4 of the PPA which deals with 'Force Majeure Exclusions' which 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) of the said Article shall be excluded from being treated as Force Majeure event. However, such exclusion is subject to an exception. To the extent the events or circumstances covered under clauses (a) to (f) under Article 12.4 are consequences of an event or circumstance of Force Majeure, the events or circumstances covered under these clauses 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 of the Full Bench Judgement has discussed the scope 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 at 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 and the Petitioner had no control over such event. Since the promulgation of the Indonesian Regulations required all sales of coal from Indonesia to be aligned with Benchmark Price, this rendered the negotiated price agreed by the Petitioner in the CSAs for import of coal from Indonesia inoperative and the Petitioner was required to import coal from Indonesia at Benchmark Price which was higher than the negotiated price of coal. On account of the alignment of the coal price in the CSAs to the Benchmark Price, such increase in coal price was beyond the risk factored by the Petitioner in the bid assumptions while quoting the PPA tariff and risk factored in the CSAs. This has impaired the ability of the Petitioner to discharge its obligations for supply of power to the procurers under the PPA and accordingly, such rise in prices of coal has been held as an event of Force Majeure in terms of Article 12.4(a) read with Article 12.3 of the PPA. The Appellate Tribunal has clearly ruled that the impact of Indonesian Regulations on the price of coal imported by the Petitioner is not covered under 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 consequence of Direct and Indirect Non Natural Force Majeure Events and further at the maximum available to debt service obligations.

51. 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 Extension 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) a Unit cannot be commissioned by its scheduled commercial operations date because of Force Majeure Events;
>
> 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 period but not less than '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 or Procurers' Event of Default, till such time such default is rectified by the Procurer(s)."

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 Petitioner has other obligations which include the obligation 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 are extracted in this connection:

> "4.3 Purchase and sale of Available Capacity and Scheduled Energy
>
> 4.3.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to sell to the Procurers, and the Procurers undertake to pay the tariff for all of the Available Capacity up to the Contracted Capacity and scheduled energy of the power station, according to their then existing Allocated Contracted Capacity, throughout the term of this Agreement.
>
> 4.3.2 Unless otherwise instructed by all the procurers (jointly), the Seller shall sell all the available capacity up to the contracted capacity of the Power

Station to each procurer in proportion of each Procurer's then existing Allocated Contracted Capacity 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 and all the Units of the Power Station shall at all times before the exclusive benefit of the procurers and the procurers 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 available capacity and/or scheduled energy."

As per the above provisions, the seller (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 PPA. Similarly, the procurers have a right to the entire contracted capacity of the generating station and all units of the generating station 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 seller 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 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 PPA. In the light of the above discussion, we are of the view that the Petitioner is entitled for relief in tariff to the extent its ability was impaired by Indonesian Regulations.

52. Prayas has argued that the Petitioner is not entitled to the benefits of Article 12.7(a) and (b) of the PPA. In para51 of the Composite Written Submission filed by Prayas, the following plea has been taken:

> "51. 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. CGPL cannot, therefore, terminate or suspend the PPA or otherwise stop generation and supply of electricity to the procurers. Article 12.7 (c) to (g) has no application to the facts of the present case."

The Hon'ble Supreme Court in the order dated 31.3.2015 in Civil Appeal No.10016 of 2014 observed that so long as Adani Power does not seek declaration of frustration of contract 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 quantifying the compensatory tariff, the correctness of which is under challenge before the 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 held that Adani Power can urge Force Majeure and Change in Law in support of Order dated 21.12.2014 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. Noting the submission of CGPL that it is not seeking any relief beyond what was granted by the Commission in the orders dated 15.4.2013 and 21.2.2014 in Petition No.159/MP/2012, the Appellate Tribunal held that on grounds of parity, CGPL can be allowed to assail findings on Force Majeure and Change in Law which are against it while supporting rest of the order. The Appellate Tribunal concluded that "CGPL is entitled to raise the plea of Force Majeure or change in law to support the compensatory tariff granted by order dated 21.2.2014, claiming parity with order dated 31.3.2015 passed in Civil Appeal No.10016 of 2014 in the case of Adani Power. CGPL can be permitted to do so in the light of Section 120 of the said Act (CPC) and in the light of the principles underlying the provisions of CPC." 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 PPA. The Petitioner in none of its pleadings before the Commission after the remand has claimed that it wants to be relieved 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 or hindered 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 PPA. In our view, the provisions of clause (a) and (b) of Article 12.7 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, in terms of clause (a) of Article 12.7 of the PPA, the Petitioner shall not be in

breach of its obligations under the PPA if it fails to supply power at the PPA tariff as its ability to supply power at PPA tariff has been impaired due to Indonesian Regulations. 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 even after that, 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 reciprocal obligations to compensate the additional expenditure incurred by the Petitioner to supply power in terms of Article 12.7(b) of the PPA.

53. 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 off-set 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 and the Petitioner is able to discharge its obligations under the PPA.

54. The Petitioner has urged the Commission to invoke the principles under Section 70 of the Indian Contract Act to grant relief to the Petitioner. The Petitioner has submitted that it has been continuously and consistently supplying power to the Procurers despite continuing Force Majeure event and therefore, the Petitioner deserves to be

compensated for such supply after taking into account the impact of such event. Article 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 applicability 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 the 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 to discharge its obligations under 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, 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 additional cost. Despite having knowledge that Indonesian Regulations had the impact on the cost of power generated from Mundra UMPP, 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 CGPL 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.

55. MSEDCL and other procurers have submitted that the Petitioner is entitled only for the debt service obligations in terms of Article 12.7 of the PPA. Article 12.7(d) of the PPA deals with payment for debt service by the procurers when the availability of the Power Plant of the Petitioner is reduced on account of Indirect Non-Natural Force Majeure Event. Article 12.7(f) also deals with payment of debt service by the procurers when

the availability of the Power Plant corresponding to the contracted capacity is reduced on account of Indirect Non-Natural Force Majeure Event and Natural Force Majeure Event affecting the procurers. In para 283 of the judgement, the Appellate Tribunal has held that the case of the Petitioner being affected by the Indonesian Regulations does not fall within the ambit of Article 12.3.1 concerning Natural Force Majeure Events and Article 12.3.2 concerning Non-Natural Force Majeure Events. Consequently, Article 12.7(d) and 12.7(f) dealing with the situations where the Seller is affected by Non-Natural Force Majeure Events and Natural Force Majeure Events affecting the procurers will not be applicable in the present case.

56. 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 or hindered on account of rise in coal prices due to occurrence of Force Majeure event consequent to promulgation of Indonesian Regulations 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 relieved from its obligations to supply power to the Procurers during the period of Force Majeure without attracting any penalty under the PPA.

(c) Article 12.7(b) entitles every Party 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 FoB price of coal on account of Indonesian Regulations in discharge of its obligations under the PPA.

(e) The provisions of Article 12.7(c) to (g) are not applicable to the facts of the present case. Further, these reliefs are relatable to the Force Majeure events covered under Article 12.3.1 and 12.3.2 and the case of the Petitioner does not fall under these articles as held by the Appellate Tribunal.

(f) In terms of Article 70 of the Indian Contract Act, the Procurers who have accepted the supply of power from CGPL 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.

III. Coal Sales Agreements

57. The Commission had directed the Petitioner to submit the following:

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

58. The Petitioner vide its affidavit dated 9.8.2016 has placed the relevant documents on record. The Petitioner, Respondents and Prayas

have made submissions on the CSAs. On the basis of the submissions made and documents placed on record, we consider it appropriate to deal with the factual matrix associated with the execution of the Coal Sales Agreements by the Petitioner/its holding company Tata Power Limited before and after the promulgation of Coal Sales Agreements. The Petitioner has stated that Tata Power's bid for Mundra UMPP was based on the legal and economic situations prevalent at the time of the bidding. According to the Petitioner, the international coal market was primarily a buyer's market, where it was possible to secure long term Coal Sales Agreements at a price which was below the prevalent market prices by securing hefty discounts and accordingly, while arriving at the tariff quoted in the bid, Tata Power had used the widely available past market data and demand supply projections including the escalation rates notified by the Commission. According to the Petitioner, Tata Power carried out a sensitivity analysis based on past escalation trend and came to the conclusion that even an escalation of up to 7% per annum over historic escalation rates would still not seriously impact the viability of the project and it could consider in the bid a significant part of the coal cost on non-escalable basis. Tata Power quoted the bid as under:

Contract year	Commencement date of contract year	End date of contract year	Quoted non-escalable capacity charges (`/kWh)	Quoted escalable capacity charges (`/kWh)	Quoted non-escalable fuel energy charges (US$/kWh)	Quoted escalable fuel energy charges (US$/kWh)	Quoted non-escapable transportation energy charges (US$/kWh)	Quoted escapable transportation energy charges (US$/kWh)	Quoted non-escalable fuel handling energy charges (`/kWh)	Quoted escalable fuel handling energy charges (`/kWh)
1	27-Jun-12	31-Mar	0.872	0.033	0.00705	0.00585	0.00285	0.00109	0.042	0.046
2	1-Apr	31-Mar	0.870	Same as above	0.00707	Same as above	0.00284	Same as above	0.046	Same as above
3	1-Apr	31- Mar	0.868	Same as above	0.00707	Same as above	0.00284	Same as above	0.048	Same as above
4	1-Apr	31- Mar	0.866	Same as above	0.00707	Same as above	0.00284	Same as above	0.047	Same as above
5	1-Apr	31- Mar	0.864	Same as above	0.00707	Same as above	0.00284	Same as above	0.051	Same as above
6	1-Apr	31- Mar	0.862	Same as above	0.00707	Same as above	0.00284	Same as above	0.051	Same as above
7	1-Apr	31- Mar	0.859	Same as above	0.00707	Same as above	0.00285	Same as above	0.051	Same as above
8	1-Apr	31- Mar	0.857	Same as above	0.00707	Same as above	0.00284	Same as above	0.056	Same as above
9	1-Apr	31- Mar	0.854	Same as above	0.00707	Same as above	0.00284	Same as above	0.055	Same as above
10	1-Apr	31- Mar	0.852	Same as above	0.00707	Same as above	0.00284	Same as above	0.055	Same as above
11	1-Apr	31- Mar	0.849	Same as above	0.00707	Same as above	0.00284	Same as above	0.060	Same as above
12	1-Apr	31- Mar	0.846	Same as above	0.00711	Same as above	0.00286	Same as above	0.060	Same as above
13	1-Apr	31- Mar	0.842	Same as above	0.00714	Same as above	0.00287	Same as above	0.059	Same as above
14	1-Apr	31- Mar	0.839	Same as above	0.00714	Same as above	0.00287	Same as above	0.065	Same as above
15	1-Apr	31- Mar	0.836	Same as above	0.00714	Same as above	0.00287	Same as above	0.065	Same as above
16	1-Apr	31- Mar	0.832	Same as above	0.00714	Same as above	0.00288	Same as above	0.063	Same as above
17	1-Apr	31- Mar	0.828	Same as above	0.00714	Same as above	0.00287	Same as above	0.071	Same as above
18	1-Apr	31- Mar	0.824	Same as above	0.00714	Same as above	0.00287	Same as above	0.069	Same as above
19	1-Apr	31- Mar	0.819	Same as above	0.00714	Same as above	0.00287	Same as above	0.067	Same as above
20	1-Apr	31- Mar	0.550	Same as above	0.00714	Same as above	0.00287	Same as above	0.076	Same as above
21	1-Apr	31- Mar	0.545	Same as above	0.00714	Same as above	0.00287	Same as above	0.074	Same as above
22	1-Apr	31- Mar	0.540	Same as above	0.00719	Same as above	0.00289	Same as above	0.072	Same as above
23	1-Apr	31- Mar	0.534	Same as above	0.00721	Same as above	0.00290	Same as above	0.082	Same as above
24	1-Apr	31- Mar	0.529	Same as above	0.00721	Same as above	0.00290	Same as above	0.079	Same as above
25	1-Apr	31- Mar	0.523	Same as above	0.00721	Same as above	0.00290	Same as above	0.076	Same as above
26	1-Apr	25th anniversary of the scheduled COD of the first unit	0.516	Same as above	0.00723	Same as above	0.00291	Same as above	0.088	Same as above

Tata Power's bid was found to be lowest having a levelised tariff of ₹2.26367/kWh and Tata Power was awarded the project. Tata Power acquired CGPL which became its fully owned subsidiary. The above quoted tariff forms part of the PPA as Schedule 11 and the Procurers are required to pay tariff at the above rates throughout the terms of the PPA. The Escalable component of the tariff in the PPA is to be escalated as per the escalation indices notified by this Commission from time to time.

59. As per Clause 3.1.2(v) of the PPA, the successful bidder is required to complete the milestone of signing the Fuel Supply Agreement within 14 months of the issue of Letter of Intent (i.e. 28.2.2008) or 12 months of signing of PPA (i.e. 22.4.2008) whichever is later. Tata Power being the successful bidder and the holding company of CGPL entered into a Master Coal Sales Agreement dated 30.3.2007 with IndoCoal Resources (Cayman) Limited (IndoCoal) for 10.11 MMTPA ± 20% (12.132 MMTPA) for three of its Power Plants, namely, Trombay {0.75 MMTPA(± 20%)}, Mundra {5.85 MMTPA (± 20%)} and Coastal in Maharashtra {3.51MMTPA (± 20%)}. As per the Master Coal Sales Agreement, the Base Price of Coal and Coal Price for a Delivery Year in respect of Mundra UMPP and Coastal Facility shall be determined as under:

Mundra UMPP

(a) Base Price:

In relation to each shipment;

(i) 55% of such shipment: USD 32/Tonne until the first anniversary of the Commercial Operation Date of the first Unit.

(ii) 45% of such shipment: USD 34.15/Tonne as on 23.2.2007

(b) Coal Price for Delivery Year:

(i) 55% of such shipment: USD 32/Tonne until the first anniversary of the Commercial Operation Date of the first Unit and thereafter, escalating (pro-rata for the part of the month) at 2.5% per annum for the next five years. Thereafter, the Coal Price will be the same as the 45% portion.

(ii) 45% of such shipment: USD 34.15/Tonne, escalating per month or pro-rata for part of the month as per CERC escalation rate as notified.

Coastal

(a) Base Price: USD 34.15/Tonne as on 23 February 2007.

(b) Coal Price for Delivery Year: USD 34.15/Tonne, escalating per month or pro-rata for part of the month as per CERC escalation rate as notified.

60. Mundra UMPP requires 12 MMTPA of coal for generation and supply of contracted capacity to the Procurers. As already stated, Tata Power entered into an Agreement dated 30.3.2007 with IndoCoalwhich

included 5.85 MMTPA (± 20%) for Mundra UMPP as noted above. For the balance fuel requirement of Mundra UMPP, Tata Power entered into Balance Coal Sale Agreement dated 9.9.2008 with CGPL. Clause 2.4 of the said Agreement is extracted as under:

> "2.4 Taking into consideration CGPL's request, Tata Power hereby agrees, on a best endeavour basis, to provide CGPL with the Balance Coal Requirement for the project out of supply arrangements entered into or to be entered into by Tata Power including the option of diverting part of the imported coal specified for its Coastal Facility in the original CSA, on terms and conditions to be separately agreed between the Parties."

As per the above provision, Tata Power had committed to arrange balance coal for CGPL on best endeavour basis including the option of diverting part of the coal imported for Coastal Facility on the terms and conditions separately agreed by the parties.

61. IndoCoal and Tata Power entered into a Coal Sales Agreement dated 31.10.2008 in order to carve out the quantities of coal to be supplied alongwith other related provisions to each of the Mundra Facility and Trombay Facility from the original CSA. On the same day, IndoCoal and CGPL entered into a Coal Sales Agreement dated 31.10.2008 for supply of 5.85 MMTPA (± 20%) at the same price as in the original Coal Sales Agreement dated 30.3.2007 between IndoCoal and Tata Power except to the extent that the base price of 45% of coal was at the rate of USD 34.15/Tonne as on 23.2.2007. Subsequently, by

an Assignment and Restatement Agreement dated 28.3.2011 between IndoCoal and Tata Power Limited and CGPL, the Tata Power assigned the 3.51 MMTPA (± 20%) of coal earlier meant for its Coastal Facility in favour of CGPL. The Petitioner has notified the lead procurer, GUVNL as regards the fulfilment of conditions subsequent by the Petitioner in terms of Article 3.1.2 of the PPA vide its letter dated 22.11.2011 and GUVNL as the lead procurer has confirmed compliance of the condition by the Petitioner vide its letter dated 7.3.2012.

62. 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.

63. In order to meet its obligations under the Coal Sale Agreement, IndoCoal was sourcing its coal from PT Kaltmin Prima Coal (KPC) which had acquired the mining rights under the Concession Agreement dated 8.4.1982 with the Government of Indonesia. In view of the promulgation of Indonesian Regulations, KPC expressed its inability to supply and effect the sale of coal to IndoCoal after 23.9.2011 being the cut-off date as per Indonesian Regulations, without complying with the provisions of the said Regulations. IndoCoal issued a 'Notice of Change in Government Approvals' dated 9.3.2012 calling upon the Petitioner to align the original CSA with the Regulations and modify the CSA inter alia to reflect compliance with the Benchmark Price of coal as the Coal Price for effectuating any supply and sale of coal after 23.9.2011. In order to

ensure the compliance under the Indonesian Regulations, the Petitioner entered into amendments to the Coal Sales Agreements on 23.5.2012 and 22.6.2012. Benchmark price has been defined in the amendments dated 31.5.2012 and 22.6.2012 as under:

> "Benchmark Price" means the monthly price for the coal as applicable for the respective specifications as per the notification published by the Director General of Mineral and Coal on behalf of the Minister of Energy and Mineral Resources of the Republic of Indonesia in accordance with the Regulations."

Further in the amendment, reference to CERC notification on escalation indices has been deleted and the coal price has been agreed to be determined as under:

> "The Coal Price for each shipment will be determined in accordance with the Regulations by reference to Benchmark Price or the current market price at which Supplier is selling coal to its customers during that month, whichever is lower."

64. CGPL executed a Novation Agreement dated 25.3.2014 with KPC and IndoCoal under which IndoCoal novated the Coal Sale Agreements dated 31.10.2008 and 28.3.2011 in favour of KPC. As a result of the Novation Agreement, CGPL is directly procuring coal from KPC. Prior to the Novation Agreement, IndoCoal was supplying coal at the same price as it was procuring from KPC. In this connection, the Petitioner has placed on record the invoices raised by KPC on IndoCoal and corresponding invoices raised by IndoCoal on CGPL as Annexure P-8 to the affidavit dated 9.8.2016. On perusal of the said annexure, it is

noticed that the invoices pertain to the period between 19.2.2011 and 28.2.2014 and the coal prices in the invoices raised by KPC match with the invoices raised by IndoCoal. The Petitioner has clarified that between 28.2.2014 and 25.3.2014 when the Novation Agreement became effective, the Petitioner had not procured coal from KPC through IndoCoal and therefore, no invoices are available for the said period.

65. The Petitioner was also procuring eco coal from PT Arutmin Indonesia through IndoCoal since February, 2011 on spot contract basis as available from time to time in order to mitigate the adverse impact of the promulgation of Indonesian Regulations on Mundra UMPP. The Petitioner is stated to have discontinued procurement of eco coal with effect from March 2014 from Arutmin since it had resulted in plant inefficiency, higher operating and maintenance expenditure and adverse impact on the useful life of the equipment. The Petitioner has submitted that IndoCoal was supplying eco coal to Mundra UMPP at the same price as it was procuring coal from Arutmin. In this connection, the Petitioner has placed on record the invoices raised by Arutmin on IndoCoal and corresponding invoices raised by IndoCoal on CGPL at Annexure P-9 to the affidavit dated 9.8.2016. On perusal of the said Annexure, it is noticed that the invoices are between 27.2.2011 and

28.2.2014, and the coal prices in the invoices raised by PT Arutmin Indonesia match with the invoices raised by IndoCoal.

66. In the light of the above factual matrix, we intend to examine the rival submissions of the Petitioner and Respondents including Prayas with regard to the Coal Sales Agreements. The Respondents have raised the following issues with regard to the Coal Sales Agreements entered into by the Petitioner and the impact of Indonesian Regulations on the Coal Sales Agreements:

(a) The Commission is required to determine the extent to which CGPL had a Coal Sales Agreement for procuring imported coal and the amount of discount available to CGPL on these Coal Sales Agreements while granting relief as this aspect has not been dealt with by the Appellate Tribunal.

(b) The monetary relief is to be computed as the difference between the HBA Index Price of the relevant GCV of Coal for the concerned month and the discounted price at which CGPL would have been entitled to import coal from the Indonesian mines (of the said GCV), but for the promulgation of Indonesian Regulations.

(c) The discount is available only for 3.22 MMTPA of Melwan Coal in case of CGPL and the balance quantum of coal is as per this Commission's escalation rate, which is aligned to market price. Therefore, only29% of the total quantum of coal required for Mundra UMPP is affected by promulgation of Indonesian Regulations, and the said impact is restricted to first 5 years only.

(d) CGPL's CSA does not state that CGPL is required to procure coal from Indonesian mines alone. CGPL could have procured coal from any other country and therefore, promulgation of Indonesian Regulations has no impact on the PPA.

(e) Coal procured from sources other than fructified Coal Sales Agreements cannot be considered for grant of relief.

67. The Petitioner has contended that the submissions qua Coal Sales Agreement cannot be raised in the present proceedings as it is barred by the principles of *res judicata* in view of the findings of the Appellate Tribunal in paras 300 and 301 of the Full Bench judgement. With regard to the contention of the Respondents that the relief should be confined to 29% corresponding to 3.22 MMTPA of Malewan coal, the Petitioner has submitted that the issues of CSA and escalable and non-escalable

components of tariff cannot be raised in the remand proceedings. The Petitioner has further submitted that the price, discount, structure of PPA like escalable and non-escalable as agreed in original Coal Sales Agreements have been completely altered by the Indonesian Regulations and therefore, these aspects are no more relevant for grant of relief under the PPA. The Petitioner has rejected the contention of the Respondents that base price mentioned in the CSAs should be used to assess the impact of Force Majeure on Mundra UMPP. The Petitioner has submitted that PPA is based on bid tariff and therefore, relief ought to be granted to CGPL is the difference between the actual FOB cost of coal consumed by CGPL and the actual FOB value recovered by CGPL in terms of the PPA. The Petitioner has submitted that the energy charges quoted by Tata Power was on the basis of the assumption that FoB price of USD 30.10/MT for GCV of 5350 kCal/kg. As regards the procurement of coal from other countries, the Petitioner has submitted that the Appellate Tribunal has held that Indonesia was the cheapest source for procuring imported coal and the Indonesian Regulations has wiped out the premise on which Tata Power had submitted the bid. As regards the suggestion of Respondents that coal procured from sources other than fructified CSA, the Petitioner has submitted that on a few occasions, it had procured high GCV/low GCV coal from countries other

than Indonesia through distress spot sale. In case of low GCV coal, the Petitioner has stated that it had procured the same on account of preferential rates available in such countries. Further, the Petitioner has stated that for usage of low GCV coal, it had to incur additional expenditure on ocean freight and fuel handling cost which has not been claimed by CGPL under the proposed methodology.

68. On consideration of the submissions of the Petitioner and Respondents, the first issue that engages our attention is whether consideration of the Coal Sales Agreements for the purpose of determination of relief for Force Majeure is barred by the principle of *res judicata*. The Petitioner has relied upon the observations/findings of the Appellate Tribunal in paras 300 and 301 of the Full Bench judgement in support of its contention that consideration of Coal Sales Agreements or the quantity covered under such agreements or the coal price agreed in such agreements fall outside the scope of the remand as the same has been argued, considered and decided by the Appellate Tribunal.

69. As regards *res judicata*, we have to consider two issues. The first issue is whether the Petitioner had CSAs for the entire quantity of coal required by Mundra UMPP. The second issue is whether the negotiated price of coal in the CSAs should be considered for working out the relief

to the granted to the Petitioner. According to the Petitioner, both these issues are barred by *res judicata*. On the other hand, the Respondents including Prayas have argued that these issues have not been determined by the Appellate Tribunal and hence, *res judicata* is not applicable in this case.

70. On the first issue, the Respondents and Prayas have submitted that CGPL had CSA dated 30.10.2008 for only 5.85 MMTPA ± 20% prior to the promulgation of Indonesian Regulations and therefore, the said CSA is only affected by Indonesian Regulations. The Respondents have submitted that out of 5.85 MMTPA ± 20%, discount was available to CGPL for 3.22 MMTPA of Malewan Coal only since the balance quantity of coal was as per the escalation rate of CERC and therefore, only 29% is affected by Indonesian Regulations. The Respondents have further submitted that the Restatement and Assignment Agreement transferring the coal meant for Coastal to CGPL was executed on 28.3.2011 which was issued after the promulgation of Indonesian Regulations and therefore, cannot be considered for grant of relief. The Petitioner has submitted that Tata Power entered into a CSA dated 30.3.2007 with IndoCoal for 10.11 MMTPA ± 20% for three of its Power Plants including CGPL (5.85 MMTPA ± 20%) with a clear understanding that Tata Power would allocate/assign the identified capacities to any of its project at a

later date. On 9.9.2008, Tata Power entered into a Balance Coal Sale Agreement to ensure that the balance fuel requirement of CGPL was met either through fresh CSA or diverting coal meant for Coastal to CGPL. The Petitioner has submitted that as a condition precedent for drawdown of loan, there was a requirement for execution of Fuel Supply Agreement directly with CGPL. Accordingly, the Coal Sales Agreement of 30.3.2007 was replaced by individual Coal Sales Agreements. The Petitioner entered into a Coal Sales Agreement with IndoCoal on 31.10.2008 for supply of coal on the same terms and conditions as in the CSA of 30.3.2007. The Petitioner has submitted that Tata Power/CGPL were exploring various options to tie up the balance requirement of coal for the project in a manner that the weighted average FoB Price of coal of all CSAs including the CSA dated 31.10.2008 would match with the corresponding bid tariff. On account of promulgation of Indonesian Regulations, it was not possible for Tata Power/CGPL to enter into CSA at a market discounted price for the balance coal requirement and therefore Tata Power assigned the allocation for Coastal Facility to CGPL for 3.51 MMTPA (± 20%). The Petitioner was required to enter into the Restatement and Assignment Agreement in order to comply with the Conditions Subsequent stipulated under the PPA and Financing Documents. The Petitioner has submitted that even if the Petitioner had

entire requirement of coal tied up at a discounted price, the promulgation of Indonesian Regulations would have made the same null and void. The Petitioner has submitted that the execution of the date of restatement agreement has no relevance for the calculation of the relief for Force Majeure.

71. We have considered the submissions of the Petitioner and the respondents. As per the Standard Bidding Documents and Clause 3.1.2(v) of the PPA, the successful bidder is required to complete the milestone of signing the Fuel Supply Agreement within 14 months of the issue of Letter of Intent or 12 months of signing of PPA whichever is later. Therefore, it was not expected of Tata Power to enter into fructified Coal Sales Agreement prior to the submission of bid. Tata Power after market survey and keeping in view the market trend regarding availability and price of imported coal, quoted the Fuel Energy Charge under escalable and non-escalable head. Subsequent to the award of the project, Tata Power entered into CSA dated 30.3.2007 for import of coal from Indonesia for three of its facilities, namely, CGPL, Coastal and Trombay. In so far as CGPL was concerned, Tata Power tied up coal of 5.85 MMTPA(± 20%) and for balance quantity, it entered into a Balance Supply Agreement in terms of which Tata Power committed on best effort basis to arrange coal or divert the coal meant for Coastal in favour

of CGPL. The Petitioner entered into a CSA dated 30.10.2008 with IndoCoal for 5.85 MMTPA ± 20%. Tata Power assigned the CSA for 3.51 MMTPA ± 20% in favour of CGPL on 28.3.2011. As Tata Power could not arrange coal at a discounted price, it assigned the coal meant for Coastal in favour of CGPL in order to fulfil the Condition Subsequent and Financing Agreement. Though the date of assignment was after the promulgation of Indonesian Regulations, the fact remains that Tata Power which won the bid and was awarded the project had arranged coal of 5.85 MMTPA ± 20% for CGPL and 3.51 MMTPA ± 20% for Coastal and through a Balance Supply Agreement had committed to divert the coal meant for Coastal to CGPL which was actually diverted through the Restatement Agreement of 23.9.2011. In other words, Tata Power had the arrangement for 9.36 MMTPA ± 20% coal for CGPL which was prior to the date of promulgation of Indonesian Regulations. CGPL has brought the fact of full arrangement through Coal Sales Agreement to the notice of the lead procurer, GUVNL who has accepted that CGPL had complied with the Conditions Subsequent.

72. Paras 300 and 301 of the Full Bench judgement are extracted as under:

> "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. We have already discussed the drastic nature of the Indonesian Regulation. It is not necessary to repeat the same. The cheapest coal was available in Indonesia at a negotiated price which was much less than the benchmark price prior to promulgation of Indonesian Regulation. The generators had taken reasonable care and complied with Prudent Utility Practices by executing CSA with the mining companies in Indonesia. 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.

301. In order to answer the issue whether the CGPL had FSAs for procurement of coal for Mundra Project at a price less than market price, we must go to CGPL's case. According to CGPL, Mundra UMPP is based on imported coal and has an estimated coal requirement of approximately 12 MMTPA. CGPL had made arrangement of imported coal from Indonesia by entering into CSA dated 31/10/2008 with IndoCoal Resources (Cayman) Limited under the laws of Republic of Indonesia for supply of 5.85 MMTPA. Tata Power had also entered into an agreement with CGPL on 9/9/2008 for meeting the balance coal requirement of 6.15 MTTPA. Subsequently, Tata Power has assigned its agreement with IndoCoal Resources (Cayman) Limited for supply of 3.51 MMTPA (which was earlier meant for Coastal Maharashtra facility) in favour of CGPL vide Assignment and Restatement Agreement dated 28/3/2011. The coal requirement of Mundra UMPP is met by sourcing coal on the basis of these two agreements. The Indonesian Regulation made all long term CSAs from Indonesia to be adjusted with the Indonesian Regulation within a period of 12 months i.e. by 23/9/2011. On account of this and escalation in international coal prices, CGPL is supplying power to the procurers by purchasing coal at a higher price than what was agreed in the CSAs without any adjustment of tariff and is consequently stated to suffer a loss of ₹1873 crores per annum and ₹47,500 crores over a

period of 25 years. CGPL took up the matter with GUVNL, who is the lead procurer and the MoP, GoI vide its letter dated 4/8/2011. CGPL also took up the matters with the procurers in the Joint Monitoring Meeting dated 6/2/2012 for suitable adjustment in tariff. MoP, GoI in its Reply dated 30/9/2011 responded to CGPL's representation by stating that "….PPA is a legally binding document exclusively between the procurers and the developer. Therefore, any issue arising therein is to be settled within the provisions of PPA by the contracting parties for which Gujarat being the Lead Procurer may take necessary action…..". CGPL also approached the Indonesian Government vide its letter dated 16/2/2012 requesting to exempt the existing CSAs from the purview of Indonesian Regulation, but in vain. Thereafter, IndoCoal Resources (Cayman) Limited, which supplies coal to CGPL under the CSAs issued a notice to CGPL on 9/3/2012 calling upon it to align the original CSAs with the Indonesian Regulation. The CSAs were accordingly amended on 23/5/2012 and 22/6/2012 to align them with the Indonesian Regulation and to ensure uninterrupted supply of coal under the provisions on the PPA. CGPL submitted that Tata Power submitted its bid for Mundra UMPP in December 2006 after considering the prevailing economic situation at the time of the bidding. According to CGPL, Tata Power surveyed the global coal market before it submitted its bid for the project, based on which Indonesia was chosen as the source given the coal availability, time-frames and costs as compared to the two other major coal exporting countries namely Australia and South Africa apart from Indonesia having a legal regime honouring bilateral contracts since 1967. According to CGPL, between the bid date and June 2012, the actual increase in the price of coal was 153%. This shows the steep increase in actual prices vis-à-vis past historical trends. Such an unforeseeable and unprecedented increase in coal prices was not foreseen by any bidder and has completely wiped the basis of which the Bid was submitted by CGPL. There is no doubt that the promulgation of the Indonesian Regulation 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 Tata Power in its bid. The bid submitted was based on the prevalent economic situations in Indonesia to enter into a long term CSAs at competitive prices with discounts to the prevailing market conditions. CGPL would have continued to supply power at this price had the Indonesian Regulation not made it mandatory for sale of coal from Indonesia at international benchmark prices. Therefore, the competitive advantage of securing coal at lower prices that CGPL was enjoying by acquiring mining rights in Indonesia or by entering into long term CSAs with the coal suppliers in Indonesia appears to have been fundamentally altered/wiped out after the coal sales from Indonesia are required to be aligned with international benchmark prices of coal. The procurers and consumer organizations have not been successful in controverting the above case of CGPL. We therefore have no hesitation in holding that the CGPL had FSA for procurement of coal for Mundra Project at a price less than market price."

73. The Appellate Tribunal in para 301 of the judgement has observed that “the coal requirement of Mundra UMPP is met by sourcing coal on the basis of these two agreements”. The Appellate Tribunal has further observed that “the competitive advantage of securing coal at lower prices that CGPL was enjoying by acquiring mining rights in Indonesia or by entering into long term CSAs with the coal suppliers appear to fundamentally altered/wiped out after the coal sale from Indonesia are required to be aligned with the international benchmark prices of coal. The procurers and consumers organizations have not been successful in controverting the above case of CGPL. We therefore, have no hesitation in holding that the CGPL had FSA for procurement of coal for Mundra Project at a price less than market price.” Though the Restatement Agreement was signed on 28.3.2011 which is after the promulgation of Indonesian Regulations, we are of the view that in the light of clear cut findings of the Appellate Tribunal that both the CSAs were affected by Indonesian Regulations, the issue cannot be reopened and the coal allocated to CGPL under Restatement Agreement shall be considered for grant of relief to the Petitioner. Accordingly, it is held that the Petitioner had coal tie up for 9.36 MMTPA ± 20% (under the CSA dated 31.10.2008 for 5.85 MMTPA ± 20% and the Restatement Agreement dated 28.3.2011 assigning 3.51 MMTPA ± 20%) before the promulgation

of Indonesian Regulations. Accordingly, the contention of the Respondents that only 29% of the coal covered under the CSAs should be considered for relief for Force Majeure cannot be accepted.

74. The second issue is whether the coal price in the CSAs dated 31.10.2008 and Restatement Agreement dated 28.3.2011 should be considered to work out the relief for force majeure. The Petitioner has submitted that Tata Power quoted the bid based on its survey of the prevailing market situation in Indonesia to enter into long term CSAs at competitive prices with discounts to the prevailing market conditions. The Petitioner has submitted that after promulgation of Indonesian Regulations, "the prices mentioned in the above mentioned fructified Coal Sales Agreements cannot be considered as a true reflective of FoB price of coal in terms of the quoted energy charges for computing the relief of force majeure to be granted to CGPL". The Petitioner in the proposed mechanism has submitted that adverse impact on CGPL due to increase in FoB price of imported coal (in US Dollars and on FoB basis) is the difference between FoB fuel cost incurred by CGPL and FoB fuel cost recovered by CGPL on the basis of the monthly Fuel Energy Charges reflected in Schedule 11 of the PPA.

75. The Petitioner has submitted in para 40 of the Consolidated Written Submission that the energy charges quoted by CGPL was on the basis of assumption that FoB price of USD 30.10/ MT and CGPL had a market discount of approximately USD 12/MT on the coal to be imported from Indonesia. CGPL has justified the proposition on the basis of the following:

(a) Calculation of Base Price of imported coal using normative bid parameters and prevalent coal price of USD 49.79/MT for GCV of 6322 kCal/kg adjusted to USD 42.13/MT for GCV of 5350 kCal/kg quoted in the bid.

(b) An executed Coal Sales Agreement of May 2004 between Tata Power and PT Adarro (further amended in August 2004) providing supply of 1 Million Ton of coal for Tata Power's Trombay Plant at a price of USD 30/Ton for a coal quality of 5200 kCal/kg and using this reference price for 5350 kCal/kg to work out the price of USD 30.86 per Ton.

(c) Information Memorandum dated October 2007 prepared by Credit Suisse for PT Bhumi Resources for potential sale of stakes in KPC, Arutmin and IndoCoal which estimated the selling price of USD 30.4/Ton for Malewan coal of GCV 5400 kCal/kgand using

this reference price for 5350 kCal/kg to work out the price of USD 30.11 per Ton.

(d) Tata Power has been able to secure supply of 12 MMTPA of coal from Bumi Mines at a base rate of USD 32/Ton and USD 34.15/Ton which reflects the availability of substantial discounts to market price at that time.

Based on the above, the Petitioner has submitted that the difference between the Base Price of USD 30.10/MT and the actual FoB price paid by the Petitioner should be allowed as relief on account of Force Majeure in terms of the judgement of the Appellate Tribunal.

76. The Respondents have submitted that the monetary relief should be restricted to the difference between the HBA price of the relevant GCV of coal for the concerned month and the discounted price at which the Petitioner would have continued to import coal from the Indonesian mines for the said grade.

77. We have considered the submissions of the Petitioner and the Respondents including Prayas. The Petitioner has submitted that the escalable and non-escalable elements of Fuel Energy Charge in the PPA were based on the prevailing market conditions of coal in

Indonesia. Subsequent to the execution of the PPA, the Petitioner has entered into CSA with IndoCoal on 31.10.2008 in which coal price has been agreed partly on escalable basis and partly on non-escalable basis. The Petitioner had entered into the CSA with IndoCoal after considering all relevant factors, the primary being that the Petitioner would be able to recover the quoted energy charges based on the procurement of the coal at the Coal Price in the CSAs. In other words, the Fuel Energy Charge quoted in the PPA were recoverable based on the escalable and non-escalable elements of coal price in the CSAs and had there been no Indonesian Regulations, the Petitioner would have continued to supply power to the procurers by procuring coal as per the terms and conditions of the CSAs. On account of the Indonesian Regulations, Coal Prices agreed in the CSAs have been aligned to Benchmark Price. Therefore, the Petitioner would have to bear extra expenditure equivalent to the difference between the coal price that the Petitioner would have paid had the Indonesian Regulations not intervened and the coal price that the Petitioner is required to pay after the intervention of the Indonesian Regulations. This difference between the negotiated coal price agreed in the CSAs with escalation on year to year basis and the FoB price of coal at Benchmark price shall be the relief admissible to the Petitioner on account of the intervention of

Indonesian Regulations. Therefore, the suggestion of the Petitioner in the proposed mechanism to consider the base price of coal based on its bid assumptions for the purpose of working out the relief for force majeure cannot be accepted.

78. The Petitioner has submitted that the Appellate Tribunal has also discussed the various CSAs entered into by the Petitioner and has concluded that the competitive advantages of these CSAs were completely altered or wiped out after the sale from Indonesia were required to be aligned with the benchmark prices of coal. On this basis, the Appellate Tribunal came to a finding that the premise on which the energy charges were quoted by Tata Power in its bid has been altered on account of the promulgation of the Indonesian Regulations. Therefore, the consideration of the coal price is barred by *res judicata*. In our view, the observations/findings of the Appellate Tribunal do not support the contention of the Petitioner that negotiated price agreed in the Coal Sales Agreements entered into by the Petitioner cannot be considered for working out the relief for force majeure. In fact the very basis of the relief is that the negotiated price of coal agreed in the CSAs has been altered after the promulgation of the Indonesian Regulations which has aligned the price of coal to international benchmark price. Therefore, the impact of Force Majeure on account of Indonesian

Regulations has to be measured on the basis of the difference between the Benchmark Price and the negotiated price in the CSAs. Further, it is pertinent to mention that consequent to the promulgation of Indonesian Regulations, the Coal Sale Agreements entered into by the Petitioner with IndoCoal have not been abandoned. In fact, the Petitioner has entered into Amendment Agreements to the CSAs to replace the provisions regarding 'Base Price' and 'Coal Price for Delivery Year' with 'Benchmark Coal Price' and further reference to CERC escalation has been deleted. Moreover, the CSAs have been novated in favour of KPC for supply of coal directly by the Coal Mining Company to the Petitioner. Coal is also being supplied from Indonesia to the Mundra UMPP of the Petitioner in terms of the said CSAs. Therefore, the direct effect of Indonesian Regulations is the replacement of the negotiated Coal Price agreed in the CSAs with the Benchmark Price of coal. In all other respects, the provisions of the CSAs by and large remain the same. For a fair assessment of the impact of Indonesian Regulations, it is necessary to compare and find out the difference between the coal price at which CGPL would have continued to procure coal had the Indonesian Regulations not intervened and the benchmark coal price which CGPL has to pay after the promulgation of Indonesian Regulations. The Commission is of the considered view that the

negotiated price agreed in the CSAs executed by the Petitioner has to be considered with reference to the benchmark price of coal as per the HBA or actual price of import of coal from Indonesia to assess the impact of Force Majeure.

79. The Respondents have raised an objection that the coal procured from sources other than the fructified Coal Sales Agreements should not be considered for the purpose of computation of relief for Force Majeure. The Petitioner has submitted that in its affidavit dated 9.8.2016, the Petitioner has placed on record the entire quantum of coal procured for Mundra UMPP including the GCV of said coal. The Petitioner in the said affidavit has submitted that on a one-off occasion the Petitioner has procured low GCV/high GCV from countries other than Indonesia. According to the Petitioner, the primary reason for procuring low GCV coal from countries other than Indonesia was availability of preferential rate in such countries and to mitigate the losses incurred by CGPL due to promulgation of Indonesian Regulations and non-implementation of the compensatory tariff granted by the Commission. The Petitioner has submitted that it should not be penalized for acting in a bonafide manner as a prudent utility in terms of the provisions of the PPA and in overall consumer interest. Respondents have submitted that the coal procured by the Petitioner from sources other than Indonesia should not be

considered for the purpose of relief. We have considered the submissions of the Petitioner and respondents. 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 said to have been affected by promulgation of Indonesian Regulations and accordingly, the coal imported from other countries or purchased from High Seas cannot be considered for the purpose of relief.

80. The respondents have raised an objection that the Petitioner had previous knowledge of the Indonesian Regulations. The respondents have submitted that the Indonesian Regulations providing for fixation of the benchmark price for export of coal is traceable to Article 4 and 5 of the Mining Law No. IV dated 12.1.2009. Pursuant to the said law, the Government of India issued Regulation 23 of 2010 on 1.2.2010 containing the enabling provisions relating to production and sale of coal including the export of coal to be guided by the benchmark price. Thereafter, the Ministry of Energy and Mineral Resources issue the Indonesian Regulations on 23.9.2010. The respondents have submitted that the source of coal which has been identified after 1.2.2010 is not affected by Indonesian Regulations. The Petitioner has submitted that the above Mining Law came into force from 12.1.2009 which is after the

date of submission of the bid by Tata Power on 7.12.2006, the date of execution of Coal Sales Agreement dated 30.3.2007 between Tata Power and IndoCoal, the agreement between CGPL and IndoCoal dated 31.10.2008, and the balance sale agreement between CGPL and Tata Power dated 9.9.2008. We have already noted that the coal requirements of CGPL were tied up by Tata Power as the holding company through the Coal Sales Agreement dated 30.3.2007. The CSA dated 31.10.2008 between the Petitioner and IndoCoal and the Restatement Agreement dated 28.3.2011 between IndoCoal, Tata Power and the Petitioner were based on the original Coal Sales Agreement dated 30.3.2007. Since, the CSA dated 30.3.2007 was entered into prior to the promulgation of the Indonesian Regulations and the said CSA is the basis of the CSA dated 31.10.2008 and the Restatement Agreement dated 28.3.2011, we are of the view that Tata Power/CGPL could not be said to have prior knowledge of the Indonesian Regulations aligning the coal price under the CSAs to benchmark price.

81. In view of the above discussion, we are of the view that 9.36 MMTPA ± 20% i.e. 11.232 MMTPA which is covered under the CSA dated 31.10.2008 and Restatement Agreement dated 28.3.2011 limited to actual consumption of coal imported from Indonesia shall be

considered for the purpose of calculating the relief under force majeure. Further, the coal price agreed in the respective CSAs alongwith the relevant escalation factors shall be considered and the difference between the CSA price so worked out and the FoB price ex-Indonesia or the actual price of coal paid for coal imported from Indonesia, whichever is lower, shall be considered for calculating the relief.

IV. Operational Parameters for working out the relief

82. 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. The Petitioner vide affidavit dated 9.8.2016 has submitted that the operational bid parameters assumed by Tata Power for working out the Fuel Energy Charges on FoB basis as under:

(a) Heat Rate: 2050 kCal/kWh with degradation in Heat Rate @1% once in ten years.

(b) GCV of Coal: 5350 kCal/kg.

(c) Auxiliary Consumption: 4.75%

(d) Transit Loss: 0.20%

(e) FoB cost of Coal: USD 30.10/Ton

(f) Non-escalable Component: 55%

(g) Escalable Component: 45%

The Petitioner has submitted that Tata Power had considered the escalation factors of 3.46% per annum while working out the Fuel Energy Tariff which is line with the annual escalation rates notified by the Commission for evaluation of bids vide notification dated 22.11.2006.

83. The Petitioner has submitted that the Guaranteed Turbine Cycle Heat Rate of each Unit of Mundra UMPP is 7440 kJ/kWh=1777 kCal/kWh at 100%. The Petitioner has placed on record Heat Balance Diagram at Annexure P-11 to the affidavit dated 9.8.2006. The Petitioner has submitted that the Guaranteed Turbine Cycle Heat Rate of each Unit of Mundra UMPP is 7440kJ/kWh at 100% Turbine Maximum Continuous Rating loading of the machine. The Petitioner has placed on record a copy of the detailed Design Data and Contract Data Sheet prepared by CGPL's contractor, M/s Doosan Heavy Industries and construction Co Ltd., specifying the boiler efficiency. The Petitioner has submitted that since all units of Mundra UMPP have been commissioned between March 2012 to March 2013, allowable Gross Heat Rate can be

considered as 2121 (i.e.1777/0.8923*1.065)after taking guidance from the principles evolved in the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009. The Petitioner has further submitted that the actual performance of a Unit may vary from design performance due to variation in load, lower operating PLF, change of fuel properties, start-up and shut down etc. The Petitioner has submitted that since Mundra UMPP is not an EPC Project, and the entire work and material scope of the Project has been split into more than 100 packages, the guaranteed value of auxiliary consumption of each unit is not available. The best achieved auxiliary power consumption of Mundra UMPP is 7.79% in the Year 2015-16 using 100% Melawan coal. Detailed break-up of auxiliary consumption has been submitted at Annexure P-13 to the affidavit dated 9.8.2016.

84. The Commission has considered various parameters for the purpose of calculation of relief as under:

(a) Base coal Cost: 'Base contracted cost of imported coal' is an important parameter which shall be worked out on the basis of the cost of coal given in the CSAs dated 31.10.2008 and Restatement Agreement dated 28.3.2011 after taking into account the escalation factors. Based on the CSAs, 3.2175 MMTPA ± 20%

(3.8610 MMTPA) of coal is escalable by 2.5% per annum for five years after the first anniversary of COD of first unit and thereafter, at CERC notified escalation rate. The balance coal of 6.1425 MMTPA ± 20% (i.e. 7.371 MMTPA) is escalable at CERC notified escalation rate with effect from 23.2.2007. Accordingly, the coal consumed by the Mundra UMPP will be divided between these two formulas in the ratio of 35:65 for the purpose of working out the FoB coal price as per the CSAs. An indicative calculation is given as under:

Qty as per CSA1+CSA2	**Qty as per CSA1+CSA2@ including +20%**	**Original Rate (USD)**	**Escalation as per CSA**	**March,12 (COD of First Unit)**	**Mar,13 (USD)**	**Mar,14 (USD)**	**Mar,15 (USD)**	**Aug,15 (USD)**	**Mar,16 (USD)**
3.2175	3.861	32	As given in CSA dated 31.10.2008*	32.00	32.05$	32.85	33.68	34.02	34.52
6.1425	7.371	34.15	As per CERC Escalation	88.79	73.081	61.1285	54.9815	50.542	45.078
9.36	11.232								
Applicable CERC escalation index				260	214	179	161	148	132
Contracted FOB				**69.27**	**58.98**	**51.41**	**47.66**	**44.86**	**41.45**

@ CSA 1 refers to CSA dated 31.10.2008 and CSA 2 refers to Restatement Agreement dated 28.3.2011.
* 2.5 % for 5 years from the first anniversary of the commercial operation date of the first unit, and thereafter escalating (pro rata for part of the month) at the CERC escalation rate.
$Pro-rata for March, 2013 after the first anniversary of COD of the first unit of Mundra UMPP on 7.3.2012.

(b) Actual Coal Cost: Weighted average actual price of the coal corresponding to Price Stores Ledger (PSL) taking into cognizance

the HBA price for each shipment corresponding to the GCV as certified by the third party and duly audited shall be considered.

(c) Exchange Rate: The Petitioner has quoted the escalable and non-escalable Fuel Energy Charges in USD. In Schedule 7 of the PPA, a formula has been provided to work out the Fuel Energy Charges in INR based on the quoted Fuel Energy Charges in USD. Accordingly, USD INR Exchange Rate for the purpose of relief shall be average of SBI TT Buying Rate for the month under consideration in line with the PPA and as being billed to beneficiaries at present as per the provisions of Schedule 7 of the PPA.

(d) Station Heat Rate: Station Heat Rate considered in the Bid was 2050 kcal/kWh with 1% degradation once in ten years. In the affidavit dated 14.10.2013, the Petitioner has stated that while bidding, it had considered Heat Rate Value of 2050 kcal/kWh for first ten years, 2062.3 kcal/kWh in 11th year and 2070.5 kcal/kWh from 12th to 20th year, and 2082.92 kcal/kWh from 21st year onwards. In our view, the normative value of heat rate for the purpose of relief for force majeure would be considered as 2050 kcal/kWh for first ten years, 2062.3 kcal/kWh in 11^{th} year and

2070.5 kcal/kWh from 12th to 20th year and 2082.92 kcal/kWh from 21st year onwards.

(e) Auxiliary Consumption: The Petitioner has considered Auxiliary consumption of 7.79% in the formula. However, Auxiliary Consumption considered in the Bid was 4.75%. The Respondents including Prayas have submitted that the auxiliary consumption should be considered as 4.75%. We are of the view that Auxiliary consumption should be considered as 4.75% as per the Bid assumptions while calculating the relief.

(f) Transit losses: The petitioner has considered transit loss as 0.2% as per the bid assumptions. However, since the relief is confined to the FOB price of coal ex Indonesia, transit loss has not been allowed.

V. Computation of relief for Force Majeure

85. The Commission had directed the Petitioner to submit the proposed relief to be granted to CGPL in the light of Full Bench Judgment. The Petitioner has submitted the mechanism/formulae for computing the losses/adverse impact suffered on account of the promulgation of the Indonesian Regulations for the past period as well as for the future period. The Petitioner has considered past period as the

period from the commercial operation of the first unit of Mundra UMPP till the date of issue of order by the Commission. The Petitioner has calculated the relief for force majeure on account of Indonesian Regulations for the month of August 2013 and August 2015 as under:

Particulars	Reference	UoM	Aug-13	Aug-15
A) FoB Fuel Cost recovered under present PPA tariff				
1. Fuel Energy Charges as per Tariff (FoB tariff with bid taxes and duties)				
1a. QNEFEC (Non-Escalable Component)	Sch 11 to PPA	USD/kWh	0.00707	0.00707
1B. QEFEC (Escalable Component)	Sch 11 to PPA	USD/kWh	0.00585	0.00585
2. Applicable CERC escalation index	CERC Notification	Number	197	148
3. QEFEC (2b) after indexation (Escalable Component)	(3) = (1b) * (2)	USD/kWh	0.0115	0.0086
4. Fuel Energy tariff component	(4) = (1a) + (3)	USD/kWh	0.0186	0.0157
5. Units Sold/Scheduled	As per REA by WRPC	Mus	1548	1539
6. Fuel Cost recovered through Fuel Energy Tariff	(6) = (4) * (5)	Million USD	28.78	24.18
B) FoB Fuel Cost incurred by importing coal at benchmark price as per new Indonesian Regulations				
7. Total Quantity of Coal consumed	Auditors Certificate	Ton	835961	634620
8. Total FoB Value of Coal consumed during month excluding bid Taxes and Duties	Auditors Certificate	Million USD	37.48	29.01
9. Total FoB Value of Coal consumed during month including bid Taxes and Duties	(9) = (8) * 1.0633	Million USD	39.85	30.85
10. Actual Hardship suffered by CGPL by importing coal at benchmark price as per new Indonesian Regulations/relief sought under FM	(10) = (9) – (6)	Million USD	11.07	6.67
11. Applicable Exchange Rate	Schedule 7 to PPA	₹/USD	59.14	63.32
12. Actual hardship suffered by CGPL on account of new Indonesian Regulations/relief sought under FM	(12) = (10) * (11)/10	₹ In Crs	65.44	42.23
13. Per unit impact	(13) = (12) * 10/(5)	₹/kWh	0.42	0.27

86. The Petitioner has submitted the sample calculation for computing the impact/relief on account of promulgation of Indonesian Regulations for future period as under:

Particulars	Reference	UoM	Value
A) FoB Fuel Cost recovered under present PPA tariff			
1. Fuel Energy Charges as per Tariff (FoB tariff with bid taxes and duties)			
1A.QNEFEC (Non-Escalable Component)	Sch 11 to PPA	USD/kWh	
1B. QEFEC (Escalable Component)	Sch 11 to PPA	USD/kWh	
2. Applicable CERC escalation index	CERC Notification	Number	
3. QEFEC (2b) after indexation (Escalable Component)	(3) = (1b) * (2)	USD/kWh	
4. Fuel Energy tariff component	(4) = (1a) + (3)	USD/kWh	
5. Units Sold/Scheduled	As per REA by WRPC	Mus	
6. Fuel Cost recovered through Fuel Energy Tariff	(6) = (4) * (5)	Million USD	

B)FoB Fuel Cost incurred by importing coal at benchmark price as per new Indonesian Regulations

7. CV of Coal as per CSA Melawan Coal	CSA	Kcal/Kg	
8. Benchmark price of Melawan Coal as notified under new Indonesian Regulations	HBA Monthly Notification	USD/ton	
9. CV of Benchmark Melawan Coal	HBA Monthly Notification	Kcal/Kg	
10. CV adjusted Bench Price of the Melawan Coal procured under CSA	(10) = (8)/(9) * (7)	USD /ton	
11. Fuel Cost including Bid Taxes and Duties	(11) = (10) * (1+6.33%)	USD/ton	
12. Specific Coal Consumption (ex-bus level)	HR-2050, APC-7.79% & TL-0.20%	Kg/kWh	
13. Normative Coal Consumption	(13) = (5) * (12)/1000	Million Ton	
14. FoB Cost of Fuel incurred by importing coal at benchmark price	(14) = (13) * (11)	Million USD	
15. Hardship suffered by CGPL by importing coal at benchmark price as per new Indonesian Regulations/relief sought under FM	(15) = (14) – (6)	Million USD	
16. Application Exchange Rate	Schedule 7 to PPA	₹/USD	
17. Hardship suffered by CGPL by importing coal at benchmark price under new Indonesian Regulations/relief sought under FM	(17) = (15) * (16)/10	₹ In Crs	

87. Prayas has submitted that the sample calculations for August, 2013 and August, 2015 submitted by the Petitioner are not on the basis of normative parameters apart from certain apparent errors. Prayas has given a sample calculation for the months of August, 2013 and August, 2015 by taking the quantum of coal at discounted price (29% of the coal tied up) as under:-

S. No.	**August 2013-Assumed quantum of discounted coal at 29%**	
1.	Total quantum of coal consumed (Ton)	835961
2.	29% of the quantum of 835961 (Ton)	242428.69
3.	Total price paid (excluding taxes) (Million USD)	37.48
4.	Total price inclusive of import taxes (6.33%) (Million USD)	39.85
5.	Taxes and Duty paid (Million USD)	2.37
6.	HBA Index price (5400 GCV) (USD per Ton)	60.79
7.	Discounted price as per CSA (USD per Ton)	32.8
8.	Difference between HBA and discounted price (USD per Ton) (60.79-32.8)	27.99
9.	Taxes on the difference (at S. No. 8) (USD per Ton) (27.99 X 6.33%)	1.77
10.	Total taxes on the difference (at S. No. 8) which cannot be considered for mitigation (Million USD) (242428.69 X 1.77 = 429098.78) (Rounded off)	0.43

11.	Total taxes to be considered for mitigation (Million USD) (2.37-0.43)	1.94
	Considering mitigation on account of taxes	
12.	Total impact of Indonesian Regulation without mitigation on taxes to be considered (Million USD) (242428.69 x 27.99 = 6785579.03)	6.79
13.	Less taxes mitigated/saved (Million USD)	1.94
14.	Impact after mitigation of taxes (Million USD)	4.85
15.	Per unit impact (USD per kWh) (4.85 Million USD/1548 MU)	0.0031
16.	Per unit impact in INR (INR per kWh) (0.0031 X 65.44)	0.20
	Without considering mitigation of taxes	
17.	Total impact without considering mitigation of taxes (at S. No. 12) (Million USD)	6.79
18.	Per unit impact without considering mitigation of taxes (USD per kWh) (6.79 Million USD/1548 MUs)	0.0044
19.	Per unit impact in INR without considering mitigation of taxes (INR per kWh) (0.0044 X 65.44)	0.288
	Without considering mitigation of taxes and factoring additional tax to be paid on increased price on 29% due to Indonesian Regulations	
20.	Total impact without considering mitigation of taxes (at S. No. 12) and factoring additional taxes on account of difference in price (at S. No. 10) (Million USD) (6.79 + 0.43)	7.22
21.	Per unit impact without considering mitigation of taxes and factoring additional taxes on account of difference in price (USD per kWh) (7.22 Million USD/1548 MUs)	0.0047
22.	Per unit impact in INR without considering mitigation of taxes and factoring additional taxes on account of difference in price (INR per kWh) (0.0047 X 65.44)	0.308

S. No.	**August 2015-Assumed quantum of discounted coal at 29%**	
1.	Total quantum of coal consumed (Ton)	634620
2.	29% of the quantum of 634620 (Ton)	184039.8
3.	Total price paid (excluding taxes) (Million USD)	29.01
4.	Total price inclusive of import taxes (6.33%) (Million USD)	30.85
5.	Taxes and Duty paid (Million USD)	1.84
6.	HBA Index price (USD per Ton)	48.15
7.	Discounted price as per CSA (USD per Ton)	34.46
8.	Difference between HBA and discounted price (USD per Ton) (48.15-34.46)	13.69
9.	Taxes on the difference (at S. No. 8) (USD per Ton) (13.69 X 6.33%)	0.866
10.	Total taxes on the difference which cannot be considered for mitigation (Million USD) (184039.8 X 0.866 = 159488.89) (Rounded off)	0.16
11.	Total taxes to be considered for mitigation (Million USD) (1.84-0.16)	1.68

	Considering mitigation on account of taxes	
12.	Total impact of Indonesian Regulation without mitigation on taxes to be considered (Million USD) (184039.8 x 13.69 = 2519504.86)	2.52
13.	Less taxes mitigated/saved (Million USD)	1.68
14.	Impact after mitigation of taxes (Million USD)	0.84
15.	Per unit impact (USD per kWh) (0.84 Million USD/1539 MU)	0.00055
16.	Total impact in INR (INR per kWh) (0.00055 X 63.32)	0.034
	Without considering mitigation of taxes	
17.	Total impact without considering mitigation of taxes (at S. No. 12) (Million USD)	2.52
18.	Per unit impact without considering mitigation of taxes (USD per kWh) (2.52 Million USD/1539 MUs)	0.0016
19.	Per unit impact in INR without considering mitigation of taxes (INR per kWh) (0.0016 X 63.32)	0.10
	Without considering mitigation of taxes and factoring additional tax to be paid on increased price due to Indonesian Regulations	
20.	Total impact without considering mitigation of taxes (at S. No. 12) and factoring additional taxes on account of difference in price (at S. No. 10) (Million USD) (2.52 + 0.16)	2.78
21.	Per unit impact without considering mitigation of taxes and factoring additional taxes on account of difference in price (USD per kWh) (1.095 Million USD/1539 MUs)	0.0018
22.	Per unit impact in INR without considering mitigation of taxes and factoring additional taxes on account of difference in price (INR per kWh) (0.0018 X 63.32)	0.113

88. In view of the discussion on various aspects decided in this order, the relief admissible to the Petitioner shall be worked out as under:

Relief for Force Majeure (incremental cost of imported coal)=
[{Incremental FOB Cost per 1000 Kcal (A) x Net Heat Rate (B)/ 1000 } x {Scheduled or actual Energy whichever is lower (C)/10}]–[Mining Profit (D), if any, proportionate to coal used under the PPA]
Where:

A = [Actual FOB cost of Imported coal per 1000 kCal - Contracted FOB Cost of Imported coal per 1000 Kcal] x Actual Exchange Rate.

B = Net Station Heat Rate = Gross Station Heat Rate (actual or CERC whichever is lower) / (1-Auxiliary Consumption)

C= Scheduled or actual Energy whichever is lower as per REA/SEA/(Mus)

D = Mining Profit

89. A sample calculation for the month of August, 2015 is given as under:

	Sample Calculation for August 2015		
A	Generation (Lower of Scheduled or Actual) during the month	MU	1,539.00
B	Ex Bus Generation corresponding to Indonesian Coal={A*X}	MU	1,251.00
C	Auxilliary consumption		4.75%
D	Generation for recovery={B/(1-C)}	MU	1,313.75
E	Heat Rate	Kcal/kWh	2050
F	Contracted GCV	Kcal/kg	5350.00
G	Contracted FOB*	USD/Ton	44.86
H	Contracted USD/Kcal={G/F/1000}	USD/Kcal	0.0000084
I	Actual Wtd Avg GCV of Indonesian Coal Consumed#	Kcal/kg	5,185.02
J	Actual Wtd Avg FOB of Indonesian Coal Consumed#	USD/Ton	45.53
K	Actual USD/Kcal={J/I/1000)	USD/Kcal	0.0000088
L	Incremental USD/Kcal={(K-H)}	USD/Kcal	0.0000004
M	Exchange Rate@ (up to four decimal places as specified in PPA)	₹/USD	63.3200
N	Total Impact per unit={L*M*E}	₹/kWh	0.05
O	Total Impact={D*N/10}	Crs	6.73
P	Net Profit from mine in Indonesia[&]	Crs	(To be worked out as per para 93 of this order)
Q	Net Impact={O-P}		6.73
R	Tonnage of total coal used for generation at A^	Ton	634620
S	Tonnage of Indonesian coal^	Ton	536393
T	Wt. Avg GCV of total coal^	Kcal/Kg	5389.90

U	Wt. Avg GCV of Indonesian coal^	Kcal/Kg	5185.02
V	Heat Value of total coal={R*T}	Kcal	3420538338000
W	Heat Value of Indonesian coal={S*U}	Kcal	2781208432860
X	Ratio of heat value (W/V)		81.31%

where

G	Contracted FOB*	*	Contracted FoB shall have to be worked out on month to month basis in line with provisions of the CSAs. In the sample calculation, escalation of 2.5% per annum has been applied on 55% of 5.85 MMTPA ± 20% as per the CSA dated 31.10.2008. As regards the CERC escalation rates, escalation values as provided by Petitioner have been considered, subject to verification and authentication by both parties. The sample computation is as per the table given in Para 84 (a) above.
I, J	Actual Weighted Average GCV/FOB#	#	To be certified by Auditor
M	Exchange Rate@	@	As per the provisions of the PPA and the procedure being followed presently while billing to the beneficiaries
P	Profit from mine in Indonesia&	&	To be worked out as per formulation given in para 93.
I, J, R, S, T, U		^	These values have been worked out on the basis of assumption of FIFO (First in First out). To be corrected in accordance with the billing and payment practice being presently followed. These values to be certified by Auditor.

Note:

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.

VI. Sharing of Mining Profit

90. MSEDCL has raised an issue that M/s Tata Power has30% stake in the coal mines i.e. PT Kaltim Prima Coal, PT Arutmin and Indocoal in Indonesia through a company registered in Malaysia called Bhira Investment. Therefore, the benefits of incremental profit accruing to all these beneficiaries on account of renegotiation of Coal Sales Agreement pursuant to Indonesian Regulation should be passed on to the procurers. Rajasthan Utilities have submitted that the difference between the HBI index and the agreed contract price less applicable taxes and duties should be considered as increase in revenue of the mining companies due to impact of Indonesian Regulations for the entire quantity of coal and adjusted against the relief. Haryana and Rajasthan have submitted that the benefit earned by CGPL in transportation and handling charges should also be used to adjust the relief to be granted to CGPL. The Petitioner has submitted that since the Tata Power's equity investment in Indonesian coal mines has not been included by Tata Power in the fixed charges or energy charges while quoting the bid for Mundra UMPP, there is no rationale for seeking adjustment/sharing of the entire dividends/profit from the mining companies with the procurers. The Petitioner has submitted that there is no provision in the PPA for any such adjustment relating to mines profit, transportation,

foreign exchange and other handling charges. The Petitioner has further submitted that the claim of relief relates to the coal price on FoB basis in Indonesia and does not cover any element of transportation, handling and mines profit. The Petitioner has submitted that as a goodwill gesture the holding company of the Petitioner namely Tata Power is agreeable to offer incremental dividend and/or profits earned by it from the actual sale of coal to Mundra UMPP. The Petitioner has clarified that the incremental dividend/profits received by Tata Power in India (30%) prorated to actual coal off-take by Mundra UMPP shall be adjusted to reduce the burden on additional tariff on the Procurers.

91. MSEDCL has submitted that Tata Power Limited has sold its mine in the Indonesian Coal Mining Company PT Arutmin for USD 500 million to one of the entities of Bakrie Group, promoters of Bumi Resources and has signed an option agreement for the sale of 5% stake in PT Kaltmin Prima Coal (KPC) Indonesia coal mines for USD250 million. MSEDCL has suggested that the gains realized by Tata Power Limited from the sale of stake in Indonesian coal mining companies should be shared with the procurers of the project and the loss from the sale of stake in the Indonesian coal mining company PT Arutmin should not be passed on to the procurers. The Petitioner has submitted that the proposed sale reported by the newspapers is for Arutmin Mines and not for KPC mines. Since, CGPL is

no longer procuring coal from Arutmin Mines, Tata Power sold its stake in Arutmin Mines.

92. We have considered the submission of the Petitioner and procurers. Tata Power, the holding company of the Petitioner made an investment of USD1.2 billion in order to acquire the equity stake of 30% in PT Kaltim Prima Coal (KPC) and PT Arutmin through its 100% subsidiary Bhira Investment Limited. PT Bumi Resources which is a company registered in Indonesia, holds 70% stake in KPC and PT Arutmin. Therefore, TATA Power's share of dividends/profit from the mining companies in Indonesia is limited to 30%. The Petitioner has submitted that the investment by Tata Power in the coal mining companies in Indonesia has not been included by CGPL in the fixed charges/energy charges while quoting the tariff for Mundra UMPP. The Petitioner has submitted that investment in mining companies in Indonesia is a separate investment by Tata Power keeping in view the expansion plan/other business considerations. The Petitioner has further submitted that coal off-take agreement of Tata Power is only limited to Coal Sale Agreement which for Mundra UMPP is 9.36 MMTPA ± 20% which is a small fraction of the total sales by the mining companies KPC and PT Arutmin. Further, the Petitioner has sold its stake in PT Arutmin from which supply of the coal has been stopped to Mundra UMPP in the

year 2014. Tata Power is still holding its stake in KPC which is supplying coal to the Mundra UMPP. In our view, though, Tata Power acquired the stakes in the Indonesian Coal Mines in 2007, it was only for the purpose of meeting the energy requirements of generating stations of Tata Power and to cater for its future expansion. However, the payment made for acquiring the stakes in the Indonesian Coal mines has not been factored in the fixed charge or energy charge in the quoted tariff of Tata Power or Mundra UMPP which is corroborated by the bid assumptions submitted by the Petitioner. MSEDCL has submitted that the profits from the stake sale in Indonesian mines should be shared with the Procurers but the loss if any from such stake sale should not be shared. In our view, investment in Indonesian mines is a separate investment by Tata Power for all its generation facilities in order to secure firm source of coal supply. The Respondents have not controverted the claims of the Petitioner that the investment in the mines in Indonesia were not factored in either the fixed charges or in fuel energy charges quoted in the bid. We also do not agree with MSEDCL that profit and not the loss from stake sale in mines in Indonesia should be shared. Therefore, profit from stake sales by Tata Power in the mines in Indonesia cannot be considered while computing the relief for force majeure. As regards the sharing of profits from mines which has accrued to the coal mines in

Indonesia on account of alignment of sale price of coal with the international benchmark price due to Indonesian Regulations, the Petitioner has offered that Tata Power as a goodwill gesture is willing to share the profits from sale of coal from the mines in which Tata Power has the stake to the extent of off-take of coal from these mines for Mundra UMPP. In our view, the offer of Tata Power/CGPL is in the interest of the Procurers as this would reduce the additional burden to some extent and accordingly, the profit from mines pro-rata to the off-take of coal by Mundra UMPP has been adjusted against the relief given to the Petitioner.

93. In the light of the above, actual profit from coal mining operations in Indonesia shall be calculated based on the total incremental revenue after payment of taxes and royalty as per Indonesian Regulations. Since, Tata Power has 30% stake in the mining companies in Indonesia, the profit to be shared shall also be considered accordingly. Methodology to be followed for sharing of mining profit is as under:

Parameters	Unit	Formula
Consumption of Mined coal under the PPA	MT	A
Contractual FOB price adjusted for mining quality	USD/MT	B = Contractual Price * Ratio of benchmark prices arrived at for mining GCV and 5350 for previous months based on Indonesian coal Indices
Actual price of mined coal post Indonesian Regulation	USD/MT	C

Parameters	Unit	Formula
Incremental Profit due to Indonesian Regulation	USD/MT	D = C – B
	MUSD	E = D * A
% Taxes & Duties payable till repatriation of incremental Indonesian coal mine profit to India (to be certified by Auditors)	%	F
Actual Exchange Rate	₹ / USD	G
Net Mining Profit to be adjusted from Relief of Force Majeure	₹ Crs	H = 30% * [E * (1-F) * G] / 10

94. Based on above discussion, Indicative Template for computation of Relief is as follows:

A	Generation (Lower of Scheduled or Actual) during the month	MU	
B	Ex bus Generation Corresponding to Indonesian Coal	MU	
C	Auxilliary consumption		4.75%
D	Generation for recovery={B/(1-C)}	MU	
E	Heat Rate	Kcal/kWh	2050
F	Contracted GCV	Kcal/kg	5350
G	Contracted FOB	USD/Ton	
H	Contracted USD/Kcal={G/F/1000}	USD/Kcal	
I	Actual wtd average GCV of Indonesian coal consumed	Kcal/kg	
J	Actual wtd average FOB of Indonesain Coal consumed	USD/Ton	
K	Actual USD/Kcal={J/I/1000)	USD/Kcal	
L	Incremental USD/Kcal={(K-G)}	USD/Kcal	
M	Exchange Rate	₹/USD	
N	Total Impact per unit={L*M*E}	₹/kWh	
O	Total Impact={D*N/10}	₹Crs	
P	Net Profit from mine in Indonesia	₹ Crs.	
Q	Total Impact = (O-P)	₹ Crs	

95. The sample calculation of the relief on account of force majeure for the month of August, 2015 has been given in para 89 of this order.

VII. Invoices of imported coal from Indonesia

96. The Commission directed the Petitioner to furnish certain information on Format I (coal consumed during the month from various sources), Format II (actual coal price paid by CGPL for each consignment of coal) and Format III (reconciliation of the coal during the month source wise). The Commission has also directed the Petitioner to submit the copy of the price store ledger of Mundra UMPP. For the first month of the first contract year, for the month of April of the second contract year, month of September of the third contract year and month of December of the fourth contract year. In addition, the Commission had directed the Petitioner to submit the bill of lading and bill of entry for the corresponding months. The Petitioner has placed on record the information in format I to III at Annexure P-20 to the affidavit dated 9.8.2016. As regards the proof of remittance as a coal supplier company, the Petitioner has submitted that it has been directly making payment to the mining companies. The Petitioner has submitted the required information at Annexure P-21 to the affidavit dated 9.8.2016. The Petitioner has also submitted the load port certificates at Annexure P-22 and discharge port certificate at Annexure P-23 of the said affidavit dated 9.8.2016. The Petitioner has also placed on record the copy of the coal sales invoices raised by the Indonesian mining company and

coal Supply Company for the month of April, 2013 and September 2014 and December, 2015 at Annexure P-24 of the said affidavit. The Petitioner has also placed on record the copy of the price stores ledger of Mundra UMPP for the months of March, 2012, April, 2013, September, 2014 and December, 2015 at Annexure P-25 and a summary of the shipment wise receipts of materials/coal during the corresponding months at Annexure P-26 of the affidavit dated 9.8.2016. The Petitioner has also placed on record the bill of entry and bill of lading for the corresponding months at Annexure P-27 and P-28 of the said affidavit. The Respondents have submitted that the Commission may carry out prudence check of the information/documents submitted by the Petitioner.

97. The Commission has considered the information/documents as mentioned in the preceding para which have been submitted by the Petitioner vide affidavit dated 9.8.2016. The main purpose of calling for the said information is to examine the actual FoB price of coal sold by the Indonesian coal mining companies to the Petitioner and that there is no over invoicing by the intermediary companies involved between the coal mining companies and the Petitioner, and that the remittances made for the purchase of coal on FoB price ex-Indonesia matches with the stores price ledger maintained by the Petitioner for import of coal.

On perusal of the said information, the Commission has come to the following conclusion:

(a) The Petitioner has submitted comprehensive details of shipment of coal from Indonesia such as the date of shipment; port of loading; consignee's name; destination ports; corresponding bill of entry numbers and dates; GCV of coal at port of loading and port of unloading; FoB price per unit paid by IndoCoal to the mine owners and the unit FoB price paid by CGPL to IndoCoal. It contains details of each transaction of import of coal from Indonesia from October, 2011 to February, 2016 (247 transactions) as submitted under Format II.

(b) The invoices have been issued by the mine owning company in Indonesia {PT Kaltim Prime Coal (KPC)} to IndoCoal and thereafter, the invoices have been raised by Indocoal on the Petitioner for the said shipments of coal. Comparison of invoices shows that the prices indicated in the invoices raised by KPC match with the prices of coal indicated in the invoices raised by IndoCoal. The prices are also in line with the HBA index of coal periodically fixed by the Indonesian Government for comparable quality and time frame. The

documents (bill of lading, bill of entry, invoice, test report etc.) presented before Customs for assessment of duty also indicate the same price.

(c) The GCV of the coal being shipped has been indicated in the invoices. The invoices also show adjustments made in the price on account of differences in calorific value as well as ash or sulphur content between what was declared and what was found during testing.

98. The Commission is of the view that while making payment to the Petitioner for the relief for Force Majeure as per the mechanism provided for the past period and future period in this order, the Petitioner shall be required to share all the relevant documents including invoices and Price Stores Ledger with the Procurers for verification. If any dispute arises with regard to the authenticity of the documents, the procurers are at liberty to bring the same to the notice of the Commission through appropriate application.

99. MSEDCL has submitted that a notice dated 30.3.2016 has been issued by Directorate of Revenue Intelligence to all Commissioners of Customs against the importers of Indonesian coals for resorting to over valuation of coal while importing from Indonesia. MSEDCL has requested the Commission to conduct proper investigation into the value of imported Indonesian coal while determining the relief for the Force Majeure. Learned Senior Counsel for the Petitioner submitted that CGPL's name was not included in the list of DRI circular. MSEDCL has submitted that the non-inclusion of CGPL's name from the circular does not mean that the import transactions of CGPL should not be investigated or scrutinized.

100. The Petitioner has submitted that the DRI notice dated 30.3.2016 does not include the name of CGPL. The Petitioner has submitted the copies of the (a) letters dated 28.10.2015 issued by office of the Principal Commissioner Customs, Mundra, Gujarat to DRI Gandhi Gram and DRI Mumbai seeking confirmation if any investigations were pending against CGPL as regards import of coal from Indonesia; (b) the letter dated 10.12.2015 issued by DRI Gandhi Gram confirming that no investigation was pending against CGPL and (c) the letter dated 11.4.2016 from DRI Jamnagar confirming that no case in respect of CGPL is pending before it except the investigation into the classification of coals as steam coal or bituminous coal. In our view, special agency

like Directorate of Revenue Intelligence (DRI) 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 UMPP, 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.

VIII. Carrying Cost

101. The Petitioner has submitted that the hardship/losses have been suffered by CGPL on account of promulgation of Indonesian Regulations since March, 2012 (commissioning of the first unit of Mundra UMPP) for which CGPL has availed funds through various lending institutions 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 reliefs will be crystallised through this order and the Petitioner shall raise the bills on the Procurers accordingly. Therefore,

the Petitioner shall 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. However, for the future period, the Petitioner shall be entitled for carrying cost in case of default in payment of the arrears.

102. 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 Procurers as per the payment mechanism specified under the PPA for regular monthly bills. 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, Exchange rate etc. to the Procurers alongwith the bills.

103. Adjustments for mining profits corresponding to the quantity of coal supplied to Mundra UMPP from the mines in which Tata Power/CGPL has a stake shall be carried out at the time of annual reconciliation in line with the principles given in this order.

Summary of the Findings

104. 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 UMPP.

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

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

(g) The profit earned on account of sale of coal at Benchmark price corresponding to the quantity of coal received from the mines in Indonesia in which investments have been made by Tata Power/CGPL shall be adjusted as per formulation given in this order.

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

105. 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 shall be given effect to only after grant of permission by the Hon'ble Supreme Court.

106. 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**