

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION  
GANDHINAGAR**

**Petition No. 1984 of 2021.**

**In the Matter of:**

**Petition under Section 86 of the Electricity Act, 2003 read with Article 9 and 11 of the Power Purchase Agreement dated 12.11.2018 entered between the Adani Solar Energy Kutchh Two Private Limited (formerly known as Gaya Solar (Bihar) Private Limited) and GUVNL claiming imposition of Safeguard Duty imposed on import of Solar Cells by Ministry of Finance vide Notification dated 29.07.2020 as Change in Law.**

Petitioner : Adani Solar Energy Kutchh Two Pvt. Limited,  
Adani Corporate House, Shantigram,  
Near Vaishnav Devi Circle, S. G. Highway,  
Khodiyar, Ahmedabad – 380 060.

Represented By : Ld. Adv. Mr. Sourav Roy alongwith Mr. Rajeev Lochan,  
and Ravi Sinha.

V/s.

Respondent : Gujarat Urja Vikas Nigam Limited  
Sardar Patel Vidyut Bhavan,  
Race Course Circle,  
Vadodara

Represented By : Ld. Adv. Ms. Harsha Manav alongwith Parthik Joshi.

AND

**Petition No. 1993 of 2021.**

**In the Matter of:**

**Petition under Section 86 of the Electricity Act, 2003 read with Article 9 and 11 of the Power Purchase Agreement dated 22.05.2019 between Adani Solar Energy Kutchh One Limited (formerly known as Adani Green Energy One Limited) and Gujarat Urja Vikas Nigam Limited claiming imposition of Safeguard Duty imposed on import of Solar Cells by Ministry of Finance vide Notification dated 29.07.2020 as Change in Law.**

Petitioner : Adani Solar Energy Kutchh One Pvt. Limited,

Adani Corporate House, Shantigram,  
Near Vaishnav Devi Circle, S. G. Highway,  
Khodiyar, Ahmedabad – 380 060.

Represented By : Ld. Adv. Mr. Sourav Roy alongwith Mr. Rajeev Lochan,  
and Ravi Sinha.

V/s.

Respondent : Gujarat Urja Vikas Nigam Limited  
Sardar Patel Vidyut Bhavan,  
Race Course Circle,  
Vadodara

Represented By : Ld. Adv. Ms. Harsha Manav alongwith Parthik Joshi.

**CORAM:**

**Anil Mukim, Chairman**

**Mehul M. Gandhi, Member**

**S. R. Pandey, Member**

**Date: 09/06/2022.**

**DAILY ORDER**

1. These Petitions were heard on 08.03.2022.
2. Ld. Adv. Mr. Sourav Roy, appearing on behalf of the Petitioners, at the outset submitted that the issue in these Petition is similar to Petition No. 1966 of 2021 in which arguments are advanced by the Ld. counsel for the Petitioner therein and accordingly, without reiterating the same, the Petitioner herein, while adopting them will address certain other submissions that are required to be made in these two matters. Moreover, since the reliefs claimed by the Petitioners in these matters is pertaining to 'Change in Law' and submissions / arguments to be advanced will be more or less same except for the fact, which are different, the Petitioners may be permitted to address the same for both matters jointly.
  - 2.1. It is submitted that present Petitions are filed under Section 86 of the Electricity Act, 2003 readwith Article 9 of PPA readwith Articles 9 and 11 of the Power

Purchase Agreements (i) dated 12.11.2018 entered between the Petitioner Adani Solar Energy Kutchh Two Private Limited (formerly known as Gaya Solar (Bihar) Private Limited) and the Respondent GUVNL in Petition No. 1984 of 2021 and (ii) dated 22.05.2019 entered between the Petitioner Adani Solar Energy Kutchh One Private Limited (formerly known as Adani Green Energy One Limited) and the Respondent GUVNL in Petition No. 1993 of 2021. The Petitioners are claiming relief under 'Change in Law' provisions under the PPA pursuant to imposition of Safeguard Duty imposed on import of Solar Cells vide Notification dated 29.07.2020 issued by the Ministry of Finance, Government of India.

2.2. It is argued that the PPA executed between the parties, is a contract in nature with very long horizon. The generating company quotes tariff at the time of bidding on basis of legal regime prevailing at relevant time and after emerging as a successful bidder, the PPA is executed amongst the parties, wherein; the quoted tariff becomes effective for the term of the PPA as per the relevant provisions therein. Moreover, 'Change in Law' provisions are incorporated in the PPA because the tariff to be quoted at the time of bid submission is with consideration of law prevailing as on bid deadline date and therefore, the generator/developer cannot factor about any law which is not contemplated at that point of time. Therefore, any change in law occurring thereafter, if not allowed, renders the project unviable in case, if such event of change in law leads to increase in project cost. It is submitted that any increase in taxes, cess, duties etc. like GST, safeguard duty or others levy having direct impact and resulting in increase/decrease in cost to the Petitioner after the bid deadline also impacts the quoted tariff, which is required to be adjusted.

2.3. Referring to the PPA dated 12.11.2018, it is submitted that the bid deadline date is 07.09.2018 in the present matter and 'Change in Law' is provided under Article 9 of the PPA and further referring the same which reads as under:

".....

9.1 *Definition*

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

a) *the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental*

*Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties, charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable on the final output in the form of energy) or sale of electricity.*

*b) Introduction of the Safeguard Duty and/or antidumping duty which has direct effect on the project cost.*

*....”*

2.4. It is further submitted that ‘Change in Law’ is defined as per above Article 9.1.1 (a) and Article 9.1.1 (b). Moreover, as per Article 9.1.1 above, occurrence of any of the events mentioned in Articles 9.1.1 (a) and (b) after the Bid Deadline of the PPA, qualifies as ‘Change in Law’. Since, the bid deadline was 07.09.2018 and hence in terms of above Article 9.1.1. (b) introduction of the Safeguard Duty and/or antidumping duty having direct effect on the project cost constitutes ‘Change in Law’. It is also submitted Article 9.2 provides for the relief in regard to any ‘Change in Law’ event and more particularly 9.2.2 provides for adjustment in tariff, which read as under:

*“.....*

#### *9.2 Relief for Change in Law*

*9.2.1 In case Change in Law on account of 9.1.1 (a) above results in the Power Producer's costs directly attributable to the Project being decreased or increased by one percent (1%) of the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, the Tariff Payment to the Power Producer shall be appropriately increased or decreased with due approval of GERC.*

*9.2.2 In case of Change in Law on account of 9.1.1 (b) above, the Power Producer shall be allowed an increase/ decrease in tariff of 1 paise / unit for every increase / decrease of Rs. 2 Lakh per MW in the Project Cost which shall be allowed upon submission of proof of payment made by the Power Producer towards safeguard duty and/or anti-dumping duty to the concerned Authority and with due approval of GERC.*

*.....”*

2.5. It is argued that the moot question is in terms of Section 8-B (*Powers of the Central Government to impose safeguard duty*) of the Customs Tariff Act, 1975, which provides that the Central Government may impose safeguard duty by way of a notification and as per sub-Clause 4 of the Section 8-B of the said Act, it is mentioned that the duty imposed under the said Section shall unless revoked earlier, cease to have effect on the expiry of four years from the date of such imposition. It is submitted that since extensive submissions in regard to above are already advanced by Ld. counsel for the Petitioner in Petition No. 1966 of 2021, the issue that has arisen is on account of Notification No. 2/2020 – Customs (SG) dated 29.07.2020 issued by the Ministry of Finance, Government of India imposing safeguard duty on the import of solar cells and modules from 30.07.2020. It is submitted that, earlier safeguard duty on the import of solar cells and modules at the prescribed rates was introduced vide Notification No. 1/2018 – Customs (SG) dated 30.07.2018, which was valid for a period of two years upto 29.07.2020. Thus, the extant law at time of bid submission was clear to the extent that safeguard duty to be imposed upto 29.07.2020. However, vide aforesaid Notification dated 29.07.2020, the safeguard duty was imposed w.e.f 30.07.2020, which qualifies as ‘Change in Law’ as per the provisions of the PPA and the same is claimed in this Petition.

2.6. Referring to the Notification No. 01/2018-Customs (SG) dated 30.07.2018, it is submitted that the safeguard duty was imposed at following prescribed rates in said notification on the import of Solar Cells, whether assembled or not in modules or panels:

*"..... hereby imposes on subject goods falling under heading 8541 or tariff item 8541 40 11 of the First Schedule to the Customs Tariff Act, when imported into India, a safeguard duty at the following rate,*

*namely:-*

*(a) 25% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2018 to 29.07. 2019 (both days inclusive);*

*(b) 20% ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30.07.2019 to 29.01.2020 (both days inclusive);*  
*and*

*(c) 15% ad valorem minus anti-dumping duty payable if any, when imported during the period from 30.01.2020 to 29.07.2020 (both days inclusive).*

.....”

2.7. It is submitted that at time of bid submission the above Notification was only available and from the said Notification, it is also clear that there was there no safeguard duty payable after 29.07.2020. Therefore, effectively from 30.07.2020, there was no safeguard duty or safeguard duty as per Notification 30.07.2018 was zero.

2.8. However, the Central Government vide Notification No. 02/2020-Customs (SG) dated 29.07.2020 imposed safeguard duty and referring to said Notification submitted that the applicable rate of safeguard duty reads as follows:

“.....

*(a) Fourteen point nine per cent, ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30<sup>th</sup> July, 2020 to 29<sup>th</sup> January, 2021 (both days inclusive), and*

*(b) fourteen point five per cent, ad valorem minus anti-dumping duty payable, if any, when imported during the period from 30<sup>th</sup> January, 2021 (both days inclusive).*

.....”

2.9. It is also submitted that the Petitioner has filed all the relevant documents in support of its claim such as bill of lading, commercial invoices, purchase order(s), details of Invoices, date, quantity etc. Referring to table providing details in tabular form, it is submitted that Column-4 provides the dates of Bill of lading from June-2020 onwards. Referring to Purchase Order, it is submitted that M/s Gaya Solar (Bihar) Pvt. Ltd. is the ‘Purchase/Owner’, whereas, M/s Adani Green Energy Ltd. is ‘Supplier/Contractor’. Also, certificate of Chartered Account dated 26.03.2021 is filed, which states that additional safeguard duty paid is Rs. 33,41,59,530/- and IGST of Rs. 1,67,07,967/- on the material utilised as additional duty and taxes for development of the project and accordingly, duty value falling under ‘Change in Law’ is Rs. 35,08,67,317/-. It is further submitted that the copy of the certificate of Chartered Engineer is filed with the rejoinder. However, the Petitioners will file the RFID details through additional affidavit.

2.10. Referring to para 15 of the rejoinder reply, it is submitted that purchase order for Solar modules was placed with M/s Longi on 16.12.2019 which was amended on

18.05.2020 and 21.08.2020. Subsequently, another purchase order was placed by the Petitioners with M/s Longi on 18.08.2020 which was amended on 27.10.2020.

- 2.11. It is also submitted that the Petitioner is entitled to carrying cost on the principle of compensation for time value of money towards additional costs incurred and 'Change in Law' provision is for restitution relief required to be granted in a manner to place the affected party in same financial/economic position. and basis as contained in the PPA since both the carrying cost and late payment surcharge are meant to compensate the affected party for time value of money. It is also submitted that the Petitioners are entitled to "carrying cost " from the date of Change in Law' Notification, in the present matter it is from 30.07.2020 when the safeguard Duty Notification was made applicable.
- 2.12. It is submitted that the Scheduled Commercial Operation Date (SCoD) as per PPA dated 12.11.2018 was 12.08.2020 for 100 MW contracted capacity, out of which 66.75 MW was commissioned on 23.10.2020 and balance 33.25 MW was commissioned on 29.12.2020.
- 2.13. Referring to Petition No. 1993 of 2021, it is submitted that the PPA is dated 22.05.2019 for contracted capacity of 150 MW wherein original SCOD was 22.11.2020 but due to COVID-19, the Respondent GUVNL has granted an extension of 5 months. The Petitioner has commissioned the project in phases with (i) 43.75 MW on 25.11.2020, (ii) 56.16 MW on 29.12.2020 and by commissioning balance capacity on 19.01.2021, the entire contracted capacity is already commissioned. The Petitioners have also provided all relevant information in said Petitions.
- 2.14. With regard to DC:AC ratio of the project, Ld. counsel for the Petitioners submitted that reliance is placed on Nisagra decision of the Hon'ble APTEL.
3. Ld. Adv. Ms. Harsha Manav on behalf of the Respondent GUVNL submitted that the Scheduled Commercial Operation Date for entire 100 MW contracted capacity in terms of the PPA dated 12.11.2018 executed between the parties was 12.08.2020 in Petition No. 1984 of 2021. Thus, assuming that the Petitioner had proceeded with consideration of non-levy of safeguard duty from 30.07.2020 & onwards as per Notification No. 01/2018-Customs (SG) dated 30.07.2018, the Petitioner had only

13 days after 30.07.2020 for importing solar modules, unloading, transportation to project site, installation, testing etc. and commissioning all the solar modules required for the contracted capacity of 100 MW under the PPA. It is argued that by no stretch of imagination, it is possible to complete the aforesaid tasks within the given time period and obviously, the Petitioner at the time of bid submission ought to have taken into consideration the aforesaid Notification. Hence, there is no reason to believe that the Petitioner had not factored the safeguard duty in quoted tariff as per the applicable rates of Notification No. 01/2018-Customs (SG) dated 30.07.2018 because safeguard duty was applicable till 29.07.2020. Hence, the question of any change in law does not arise.

- 3.1. It is submitted that, in any case, since the said Notification dated 30.07.2018 was the law prevailing at time of bid submission in both the Petitions, the Petitioners were required to consider financial impact for safeguard duty & GST, while quoting tariff in the bidding processes undertaken by the Respondent GUVNL. Hence, the relief prayed cannot be granted to the Petitioner.
- 3.2. It is further submitted that as per the provisions of the PPA, the relief, if any, for 'Change in Law' is already stipulated in Article 9 of the PPA, wherein, there is no provision of restitution as claimed by the Petitioner.
- 3.3. It is also submitted that since both the Petitions are filed by the Petitioners under Article 9 of the respective PPAs, it is necessary for the Petitioners to provide all relevant details including documentary evidence to the Respondent GUVNL. However, the Petitioners have not provided all the requisite details & information either in Petition No. 1984 of 2021 or in Petition No. 1993 of 2021 so as to enable filing further submissions by the Respondent in these two matters.
4. In response to the contentions raised by the Respondent GUVNL, Ld. Adv. for the Petitioners submitted that all documents required have been filed in both matters.
- 4.1. It is submitted that considering the present Petitions preferred on account of Change in Law event pursuant to imposition of Safeguard Duty through Notification dated 29.07.2020 by the Ministry of Finance, Government of India, the Commission may admit the matter.

5. Heard the Ld. counsels appearing for both the parties in these two matters. We note that in Petition No. 1984 of 2021, the Petitioner and the Respondent GUVNL have entered into Power Purchase Agreement dated 12.11.2018 for generation and supply of 105 MW AC power from Solar PV based project of the Petitioner. Similarly, in Petition No. 1993 of 2021, the Petitioner and the Respondent GUVNL have entered into Power Purchase Agreement dated 22.05.2019 for generation and supply of 150 MW AC power from Solar PV based project of the Petitioner.
- 5.1. The aforesaid Petitions are filed under Section 86 of the Electricity Act, 2003 readwith Article 9 of aforesaid PPA, seeking declaration that imposition of safeguard duty vide Notification dated 29.07.2020 on the import of Solar modules as 'Change in Law' in terms of the PPA.
- 5.2. We note that in Petition No. 1984 of 2021, pursuant to competitive bidding process followed by e-reverse auction initiated by the Respondent GUVNL vide RfS No. GUVNL/500 MW/Solar (Phase-II-R) dated 28.06.2018, M/s Adani Green Energy Limited (parent company of the Petitioner herein) had submitted its bid and thereafter, consented vide letter dated 03.10.2018 to accept 100 MW quantum of power with matched lowest tariff Rs. 2.44 per unit offered by the Respondent GUVNL vide its letter dated 01.10.2018 and accordingly, Letter of Award dated 10.10.2018 was issued by the Respondent GUVNL. Subsequently, PPA dated 12.11.2018 was executed between Gaya Solar (Bihar) Private Limited (earlier name of the Petitioner M/s Adani Solar Energy Kutchh Two Private Limited) and the Respondent GUVNL. In terms of the PPA dated 12.11.2018 executed with the Respondent GUVNL pursuant to Competitive Bidding Process, the Petitioner is a developer for setting up 100 MW Solar PV based Power Project. Accordingly, the Petitioner is a generating company under Section 2 (28) of the Electricity Act, 2003. We also note that the Respondent GUVNL is a licensee which is to procure power from the aforesaid 100 MW Solar PV based Power Project of the Petitioner in terms of PPA executed between the parties.
- 5.3. Similarly, in Petition No. 1993 of 2021, pursuant to competitive bidding process followed by e-reverse auction initiated by the Respondent GUVNL vide RfS No. GUVNL/500 MW/Solar (Phase-IV) dated 29.12.2018, M/s Adani Renewable Energy Park (Gujarat) Limited (presently known as Adani Renewable Energy Holding

Three Limited and parent company of the Petitioner herein) had submitted its bid and thereafter, awarded 150 MW at the tariff of Rs. 2.67 per unit vide Letter of Award dated 21.02.2019 by the Respondent GUVNL. Thereafter, it was intimated to the Respondent that project will be executed through Special Purpose Vehicle and subsequently, PPA dated 22.05.2019 was executed between Adani Green Energy One Limited (earlier name of the Petitioner M/s Adani Solar Energy Kutchh One Private Limited) and the Respondent GUVNL. In terms of the PPA dated 22.05.2019 executed with the Respondent GUVNL pursuant to Competitive Bidding Process, the Petitioner is a developer for setting up 150 MW Solar PV based Power Project. Accordingly, the Petitioner is a generating company under Section 2 (28) of the Electricity Act, 2003. We also note that the Respondent GUVNL is a licensee which is to procure power from the aforesaid 150 MW Solar PV based Power Project of the Petitioner in terms of PPA executed between the parties.

5.4. Thus, the issue involved in both the Petitions between the Petitioners therein and the Respondent GUVNL pertains to the terms & conditions of the respective PPAs executed between them pertaining to 'Change in Law' events. Thus, the issue involved in these two matters is between a Generating Company and licensee and hence, this Commission has jurisdiction to decide the same under Section 86 of the Electricity Act, 2003. Hence, we decide to admit both the Petitions being Petition No. 1984 of 2021 and Petition No. 1993 of 2021.

5.5. We note that the Respondent has sought certain details but according to the submissions made by the Petitioners, relevant details are already filed. However, any details that are not filed needs to be filed by the Petitioners alongwith relevant details agreed to be filed by the Ld. counsel for the Petitioners. Moreover, while filing the same, the Petitioners are also required to submit the following documents / evidence for verification of the claim of the Petitioner, if not already filed:

- (i) RFID Details
- (ii) CEIG certificate
- (iii) Commissioning Certificate
- (iv) Project specific documents;
- (v) Detailed breakup of the project cost incurred with item-wise break-up for the project;
- (vi) Detailed Calculations sheet with Safeguard duty and GST calculations;

- (vii) Details of interest cost with (a) Details of debt, (b) Details of Equity, (c) Details of Debt sanctioned along with the terms and conditions of Debt approval, (d) Release of Debt/Debt availed, (e) Original documents of the assumption while bidding carried out by the Petitioner with consideration of different items considered including Solar Module cost, Inverter cost, balance of plant cost etc. and the same was approved by Board or Management of the Petitioner company and it is part of loan documents etc.
- (viii) Capacity in DC of Solar Modules actually installed and commissioned for Solar generation on which safeguard duty is paid including GST paid thereon,
- (ix) Entire copy of the Original Contracts consisting of different clauses including Performance guarantees, delivery schedule, liquidated damages etc. and any amendments made thereto between (a) the Petitioner company and EPC Contractor & (b) EPC contractor with Equipment suppliers;
6. Next date of hearing will be intimated separately.
7. Order accordingly.

**Sd/-**  
**[S. R. Pandey]**  
**Member**

**Sd/-**  
**[Mehul M. Gandhi]**  
**Member**

**Sd/-**  
**[Anil Mukim]**  
**Chairman**

Place: Gandhinagar.  
Date: 09/06/2022.