

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR**

Petition No. 1941 of 2021

In the Matter of:

Petition under Section 86 of the Electricity Act, 2003 read with Article 9 of the Power Purchase Agreement dated 21.05.2019 executed between the Petitioner and GUVNL for approval and compensation due to Change in Law Event being imposition of Safeguard Duty.

Petitioner : Juniper Green Sigma Pvt. Ltd.

Represented by : Ld. Advocates Mr. Bijal Chhatrapati alongwith Mr. Tabish Samdani, Mr. Saunak Rajguru and Ms. Shipra Sahoo

V/s.

Respondent No. 1 : Gujarat Urja Vikas Nigam Limited

Represented by : Ld. Adv. Ms. Ashabari Thakur and Ms. Sailaja Vachhrajani, Ms. Bhavani Gattamanani, Mr. Parthik Joshi & Mr. Amit Chavda

CORAM:

Mehul M. Gandhi, Member

S. R. Pandey, Member

Date: 12/10/2023

ORDER

1. The present Petition has been filed by the Petitioner under Section 86 of the Electricity Act, 2003 read with Article 9 of the Power Purchase Agreement dated 21.05.2019 executed between the Petitioner-Juniper Green Sigma Pvt. Ltd. ("Juniper" for short) and the Respondent-Gujarat Urja Vikas Nigam Ltd ("GUVNL" for short) for approval and compensation due to Change in Law imposition of Safeguard Duty. The Petitioner has claimed levy of

safeguard duty on the import of solar cells as a Change in Law event under Article 9 of the PPA. The prayers sought by the Petitioner are as below:

- (i) To hold and declare that imposition of safeguard duty by Notification No.02/2020 – Custom (SG) dated 29.07.2020 issued by Ministry of Finance, Government of India is a ‘Change in Law’ under Article 9 of the PPA;*
- (ii) To allow the additional tariff in terms of Article 9.2.2 of the PPA.*

2. The facts of the Petition, in brief, are as under:

- 2.1. The Petitioner, Juniper Green Sigma Pvt. Ltd. is a wholly owned subsidiary of Juniper Green Energy Pvt. Ltd. The Petitioner has set up 120 MW Solar PV Grid Interactive plant in Gujarat.
- 2.2. The Respondent- GUVNL engaged in bulk purchase and sale of power within the State of Gujarat to distribution licensees unbundled from the erstwhile Gujarat Electricity Board. GUVNL is the procurer of the entire capacity under the PPA.
- 2.3. On 30.07.2018, Ministry of finance issued notification bearing number 0 1/2018 – customs (SG) and imposed safeguard duty on solar cells when imported into India, particularly from China PR and Malaysia. The safeguard duty, varying from 25% to 15% has been levied for a period of two years commencing from 30.07.2018 to till 29.07.2020.
- 2.4. On 29.12.2018, the Respondent-GUVNL issued Request for Selection Documents (RfS) for purchase of Power through competitive bidding process followed by e-reverse auction from 500 MW grid connected solar photovoltaic power projects to be set up in Gujarat (Phase IV). The bid deadline date was 06.02.2019. Accordingly, the Petitioner submitted its bid on 06.02.2019 and participated in the e-reverse auction on 19.02.2019.

- 2.5. On 21.02.2019, the Respondent GUVNL issued a Letter of Award declaring the petitioners as one of the successful bidders for supplying of 120 MW power at tariff of Rs.2.67/KWh.
- 2.6. On 21.05.2019, Juniper, a wholly owned subsidiary of JGEPL, entered into a PPA with GUVNL for supply of 120 MW power generated from Solar Power Plant. On 19.06.2019, the Commission passed an Order in Petition No. 1787 of 2018 adopting the tariff for procurement of power from the selected bidders including the Petitioner at the rate discovered through competitive bidding.
- 2.7. On 29.07.2020, the Ministry of Finance issued a Notification dated 29.07.2020 extending levy safeguard duty on import of solar cells, modules, including from China. The Safeguard Duty was extended pursuant to Section 8B of the Customs Tariff Act read with customs tariff (Identification and Assessment of Safeguard Duty) Rules, 1977, which govern the imposition of Safeguard Duty.
- 2.8. On 04.08.2020, the Petitioner issued a Change in Law notice in accordance with Article 9 of the PPA notifying GUVNL of the levy of Safeguard Duty and consequent increase in the project cost.
- 2.9. On 25.08.2020, the Respondent GUVNL granted extension of 5 months to the Petitioner for financial closure as well as SCOD of the project on account of lockdown imposed by the Central Government due to the Covid-19 pandemic. This is in line with the extension granted by MNRE vide Notifications dated 20.03.2020, 17.04.2020 and 13.08.2020 on account of Covid-19 pandemic. The SCOD in terms of the PPA was 21.11.2020 and the SCOD thus was extended to 21.04.2021.
- 2.10. On 10.11.2020, the Petitioner wrote letter to GUVNL submitting the proof of payment made by the Petitioner towards safeguard duty alongwith supporting documents in terms of Article 9.2.2, which is stated as under:

- a) The details of safeguard duty and taxes paid;
- b) Copies of the invoices of all solar modules imported by the petitioner, Juniper;
- c) Copies of the bill of entry; and
- d) Details of safeguard duty and GST payment challan as well as bank statements.

2.11. In terms of Article 9.1.1(b) of the PPA, “Change in Law” includes the introduction /modification/changes in rates of safeguard duty and/or anti-dumping duty which has direct effect on the project cost after the Bid Deadline.

2.12. The imposition of Safeguard Duty vide the Notification dated 29.07.2020 is “Change in Law” Event as per Article 9 of the PPA since:

- a. The imposition of safeguard duty is squarely covered under Article 9.1.1(b) of the PPA;
- b. As on 06.02.2019, i.e. the Bid Deadline, the safeguard duty introduced vide Notification dated 30.07.2018 was to be in effect only till 29.07.2020 since the said notification contemplates cessation of safeguard duty after 29.07.2020;
- c. The safeguard duty has been imposed vide Notification dated 29.07.2020 after 06.02.2019, which is the bid deadline date under the PPA. Further, the notification dated 29.07.2020 has been issued as a Notification and falls within the definition of ‘Law’. It has been issued by government of India, Ministry of finance, which falls within the definition of Indian government instrumentality;
- d. In terms of Article 9, any modification/change in the rate of Safeguard Duty after the Bid Deadlines, i.e. 06.02.2019 would also amount to “Change in Law”.

- e. Further, in terms of Article 9.2.2 of the PPA, the Petitioner would be entitled to compensation for such Change in Law upon submission of proof of payment to the Respondent. As on the Bid deadline, safeguard duty was effective till 29.07.2020. Therefore, the extension of safeguard duty beyond 29.07.2020, vide Notification dated 29.07.2020 will qualify as Change in Law under the PPA; and
- f. Imposition of Safeguard Duty has resulted in increase in the project cost of juniper, i.e. the petitioner.

2.13. Notification dated 29.07.2020 was issued in exercise of statutory power specified and falls within the definition of 'Law'. It was issued by Government of India, Ministry of Finance, falls within the definition of Indian Governmental Instrumentality.

- (a) Imposition of Safeguard Duty has resulted in increase in the project cost of the Petitioner.
- (b) In terms of Article 9, any modification/change in rate of Safeguard Duty after the Bid Deadlines i.e. 06.02.2019 would also amount to Change in Law.

2.14. The imposition of Safeguard Duty vide Notification dated 29.07.2020 will be covered under Article 9.1.1(b) of the PPA for which the Petitioner deserves to be compensated. Hon'ble Appellate Tribunal for Electricity ("Hon'ble Tribunal") has held changes in existing taxes and duties as Change in Law in various Judgments including: -

- (a) *Sasan Power Ltd v. CERC* : (2017) SCC Online APTEL 9 (Para 46) and
- (b) *GMR Warora Energy Ltd v. MSEDCL* : (2018) SCC Online APTEL 98 (Para 34(x))

2.15. The extension of the imposition of safeguard duty vide Notification dated 29.07.2020 will be covered under Article 9.1.1 (b) of the PPA and the Petitioner ought to be compensated for the same. Article 9.2.2 of PPA

provides for relief on account of imposition/levy of safeguard duty upon submission of proof of payment made by the Petitioner, towards Safeguard Duty to GUVNL and with due approval of the Commission.

- 2.16. In terms of Article 9.2.2, including the bill of entry and payment challans have already been provided to the Respondent GUVNL.
- 2.17. The Petitioner has submitted that in terms of article 9.2.2 of the PPA, the petitioner approached the commission seeking approval of the increase in cost on account of change in law event. Since the extension of the imposition of safeguard duty vide notification dated 29.07.2020 is covered under Article 9.1.1 (b) of the PPA and the Petitioner has to be compensated for the same.
- 2.18. It is submitted that apart from the amount incurred towards Safeguard Duty, the Petitioner has also incurred an additional cost of GST on the Safeguard Duty paid. Thus effectively, the additional non-recurring expenditure incurred by the Petitioner is equal to the amount paid towards Safeguard Duty as well the additional cost of GST on the Safeguard Duty paid. The Petitioner has incurred Rs. 38,52,27,799/- (Rupees Thirty-Eight Crore Fifty-Two Lakhs Twenty-Seven Thousand Seven Hundred and Ninety-Nine only) pursuant to the imposition of Safeguard Duty (including additional GST). The receivable amount added up to Rs. 5,09,96,608 (Rupees Five Crore Nine Lakhs Ninety Six Thousand Six Hundred and Eight only) up to January 2021. Since Petition filed in terms of Article 9.2.1 (b) of the PPA this has caused considerable strain on the company's financial resources. The Petitioner estimates interest loss of approximately Rs. 37,95,379 (Rupees Thirty-Seven Lakhs Ninety-Five Thousand Three Hundred and Seventy-Nine only) up to January 2021 due to non-receipt of the additional tariff receivable on account of imposition of Safeguard Duty (including additional GST) from Respondent GUVNL.