



**9<sup>TH</sup> UPES- Dr. PARAS DIWAN MEMORIAL INTERNATIONAL 'ENERGY LAW'  
MOOT COURT COMPETITION, 2019**

**COMPROMIS**

**REPUBLIC OF ANVILLANIA**

- Republic of Anvillania is the world's largest democracy and a common law country having cultural, social, geographical features and a political and legal system similar to that of India.
- As a rising economic powerhouse and nuclear-armed state, Anvillania has emerged as an important regional power. However, the country is endeavoring to overcome many of its social, economic and environmental problems. The country liberalized its economy in late 90s like India and have since then witnessed substantial foreign investment in the infrastructure and other sectors. For over 50 years the power sector was under the domain of the Government-owned companies. However, companies often suffered loss due to power theft, A&T losses, delays, and operational inefficiencies. The political parties often promised free power as a vote bank politics without appreciating the economic and social impact on the working of the sector. World Bank had, time and again, supported the power sector through financial turmoil, but in mid-90's it gave a final ultimatum to the Government to reform the sector.
- In the midst of financial turmoil and lower foreign currency reserve, the Republic of Anvillania opened up its market in the early 20<sup>th</sup> century to direct foreign investment. One of the changes that were made to the power sector was allowing 100% foreign direct investment in the sector. Private participation are now allowed in the generation, transmission, and distribution of power. Further, the government to encourage power generation removed the requirement of a license for a generation. Although transmission and distribution are still licensed activities, the Government has introduced open access ensuring a more competitive market for the players.
- As "power" is an entry in the concurrent list of the Constitution of Anvillania, many states have taken advantage of this and have improved their power generation by providing tariff incentives and Government support in

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procurement of land and other approvals. However, there are many states, which still suffer from substantial power deficit.

- Republic of Anvillania has been a party to Paris Agreement (Climate Change). As a party to the Agreement, the Government has a responsibility to not only to ensure “power for all” but also clean power. In this regard, the Government had come up with various initiatives to encourage the production of renewable energy. This includes an exemption for excise and customs duty in respect of all relevant inputs and resource materials. The Government has also set up the Ministry of New and Renewable Energy to support the renewable energy sector through various schemes and incentives. Government has introduced renewable purchase obligation on all procurer of power and carbon credit benefit to those who are generating power using renewable energy.

**REPUBLIC OF REYNES**

- Republic of Reynes is the largest economy in South East Asia and in the last few decades has been declared as the fastest growing economy in the world. It is the world's largest manufacturing economy and exporter of goods. With its growing GDP, the Country is now focused on investing in opportunities in other countries in South East Asia. It has successfully completed some major port and power projects in South East Asia. The President of Republic of Reynes has been visiting the countries in South East Asia for improvement of bilateral relationship between countries and seeking more investment opportunities.

**BACKGROUND**

- In March 2012, the President of Republic of Reynes visited the Republic of Anvillania. The intention was to further improve the bilateral relationship between the countries. The leaders of both the countries agreed to put their differences aside and support in mutual each other in economic and social development. The countries have also entered into a bilateral investment treaty in 2012. It is pertinent to note that Anvillania and Reynes are also Member States of a preferential trade agreement known as the Treaty of Cooperation in Trade & Commerce (TCTC) signed between seven developed and developing

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countries in the year 2000, in which members have agreed to refer any disputes arising between them on questions of law related to trade and commerce to the International Court of Justice (“ICJ”). The TCTC was envisaged to remain in force for an initial period of 20 years and thereafter extended depending upon fresh negotiations between the parties.

- Further to the visit by the President of Republic of Reynes to Anvillania, many investors from Reynes have shown investment interest in Anvillania. One of such Government-owned company, Reynes Renew Power Company Limited (“RRPCL”), incorporated in Reynes has been in discussion and negotiation with different State Governments for investment opportunities. RRPCL has been one of the largest renewable energy developers in Reynes and has successfully completed many renewable energy projects in South East Asia.
1. RRPCL has identified two such opportunities, one in the western part of Anvillania, in the state of Tharesthan and another in the eastern part, in the State of Skyland.
  2. In the State of Tharesthan, a new party, “People’s Own” has won the election in 2013. The state has been one of the most backward states in the country with high level of poverty and illiteracy. The State further suffers from lack of infrastructure, periodic drought and is dependent on tourism for its revenue. The new party during the election had made promises to provide power for all, and improve the infrastructure in the state to attract more investment and opportunities for its people. Though nature resources are scarce, the State receives sunlight throughout the year and has large stretches of desert laying unused. The State Government of Tharesthan expressed its interest to setup one of the largest concentrated solar power (CSP) plant in the Thorrer Desert with a 2,000 MW capacity (“Solar Project”). In this regard, RRPCL and State Government of Tharesthan have entered into a memorandum of understanding on 14 March 2014 to implement the Solar Project.
  3. The second project is in the State of Skyland. This State is one of the backward States in the Northeastern region of the country. It suffers from lack of infrastructure and regular floods, which often leave the state paralyzed. The State

Government has conducted various studies to overcome this situation, and one of the suggestions put forward was the building of a dam and diverting the flow of the river Burmasutra, which floods on a regular basis affecting the life and the natural resources of the area. This was considered to be of double benefit as it will regulate the flood and generate power for the State, where power is a luxury. After discussion for over a year, RRPCL has managed to bag the biggest renewable power project in the North East to develop a hydropower project with a 3,000 MW capacity ("**Hydro Project**"). In this regard, RRPCL and State Government of Skyland have entered into a memorandum of understanding on 10 August 2014 to implement the Hydro Project.

4. The proposed date for commissioning of the Solar Project was set at 1 March 2018 and the Hydro Project 1 December 2020.
5. Solar Project and Hydro Project are collectively referred to as the Projects. The Project was to be implemented through a special purpose vehicle to be set up in Anvillania by RRPCL. In this regard, a private limited company by the name of Renew Power Private Limited ("**Renew Power**") was set up in January 2015. Renew Power further set up two fully owned subsidiary by the name of Agni-Renew Power Private Limited ("**Agni Power**") (to implement the Solar Project) and Neer-Renew Power Private Limited ("**Neer Power**") (to implement the Hydro-Project), in March 2015. RRPCL proposed to invest USD4 billion in the Solar Project and USD 6 billion in the Hydro Project.
6. Renew Power has executed two power purchase agreements ("**PPAs**") through its subsidiaries of Agni Power and Neer Power. Agni Power proposes to sale its power to West Power Distribution Company ("**WPDB**"), a government-owned distribution licensee operating in the State of Tharesthan and Madhuri Pradesh. The tariff has been approved by the Central Electricity Regulatory Commission ("**CERC**") at the rate of Rs 5.76 a unit on April 2016.
7. Neer Power proposes to sale all its power to Skyland Distribution Company Limited ("**SDCL**"), a State Government owned distribution licensee operating in the State of Skyland and Hillpur. The tariff has been approved by the regulatory commission at the rate of Rs 4.20 a unit on August 2016.



8. Agni Power has procured land in the State of Tharesthan for setting up of the solar farm, and has obtained the relevant approvals. To keep the cost of the solar farm low, Agni Power has already placed an order with Solar Reynes Private Limited, the biggest producer of solar panel in Reynes and one of the largest exporter of solar panels in the world.
9. Ministry of Commerce of Anvillania through its Department of Commerce and Industry, to protect the domestic industry has imposed 25 percent safeguard duty on imported solar panels cells as recommended by Directorate General of Trade Remedies making the cost of solar farm more expensive than comprehended. It is believed that the imposition of safeguard duty would be in public interest as it will prevent complete erosion of manufacturing base of solar industry in the country, which is upcoming and holds promise for a stronger manufacturing base in the country in future.<sup>1</sup>
10. The increase in the cost of the solar panel has caused concern for Agni Power. If Agni Power has to import solar panel at a revised cost then the tariff for power has to be increase from the approved tariff. WPDB has raised an objection to the increase in tariff and has further issued a notice for termination of the PPA with Agni Power on the ground of delayed in the commissioning of the power plant.
11. Agni Power has been in continuous communication with WPDB requesting them for extension of time due to unavoidable circumstances where the solar panels were under the custody of the customs for over 6 months. Agni Power has paid the safeguard duty under protest and has procured the solar panels. The commissioning date for the Solar Project has been now notified as 1 December 2018. Agni Power is already in material breach of the PPA and the PPA does not have any change in law provision.
12. There has been reports and speculation that WPDB has entered into too many PPAs in the last few years and is now finding it difficult to honor the PPAs. Further, the tariff offered by other solar producer are much less than the agreed tariff under the PPA with WPDB. Therefore, termination of the PPA is seen a strategy by WPDB to get out of its contractual obligation.

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<sup>1</sup> Refer to the order of Ministry of Commerce and Industry, Department of Commerce (Directorate General of Trade Remedies) dated 16 July, 2018.

13. Neer Power initiated its work on December 2015, carrying out a preliminary survey and studies, acquiring land and identifying the relevant rehabilitation scheme for the affected areas. However, the work came to a stop when a local activist group, MY NATION, raised an objection to the project. Their contention was that the project will affect the sensitive local climate, change the environment and affect land use, homes, and natural habitats in the area of the dam.
14. Neer Power has submitted environmental impact assessment studies supporting the project and with mitigation measures. However, the activist group has disregarded the study claiming that the same has been fabricated. There has also been local disturbance where the engineers and workers at Neer Power were attacked. As a result, the operation of Neer Power has been suspended for the time being. Neer Power has appealed to the State Government of Skyland to provide security for the power plant and support their working. The election for the State of Skyland is due in another year, and the State Government is under pressure from the Neer Power and the locals to identify an amicable settlement. The Environmental clearance is required to be obtained from the Ministry of Environmental and Forest, under the Union (“**MoEF**”) as it is a category A project.<sup>2</sup> The MoEF has rejected the environmental impact assessment study submitted by Neer Project on the ground of insufficient evidence and measures. Further, objections have been raised by the lower riparian States, who believe that their water supply will be affected on diversion of the river. Neer Power has made an appeal to MoEF, requesting it to reconsider the report and that it is willing to re-evaluate the report based on the comments and suggestion of the Ministry. However, the issue has been politicized at the national level, and just one year left for the next election, under pressure from the Government no further action has been taken by MoEF.
15. Both Agni Power and Neer Power are laying un-operated, and Renew Power has been suffering a loss on a daily basis. The State Governments are unable to provide any assistance to RRPCL as the matter is now in the hand of the Central Government of Anvillania which has asserted that if RRPCL is aggrieved then it should explore dispute settlement options provided in the BIT signed between

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<sup>2</sup>Refer to Environment Impact Assessment Notification issued by the Government of India

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the two countries. However, apart from other qualifications, the BIT specifies five-year exhaustion of domestic remedies clause, which RRPCL cannot afford.

16. On request of RRPCL, the Government of Reynes has requested the government of Anvillania to remove the safeguard duty imposed on the import of solar panel from Reynes as it is anti-competitive in nature and against the principle of Most Favoured Nation (“MFN”) and National Treatment (“NT”) enshrined in the General Agreement On Tariffs And Trade (“GATT”), to which both the countries are parties. Further, refusal to grant environmental clearance is nothing more than a disguised form of discrimination, which is also against the principle of MFN and NT.
17. Both the arguments have been refuted by the Government of Anvillania. The Government has clarified that its action of imposing safeguard duty is a valid measure and is not targeted towards Republic of Reynes but is applicable to all imports of the solar panel. Further, as a sovereign state, it has every right to protect its environment and has such obligation and right under domestic and international law. The Government of Anvillania has also argued that all its actions are towards sustainable development, and are valid under both the domestic and international conventions.
18. Unable to resolve the dispute amicably the Republic of Reynes has invoked the relevant provisions of the TCTC and has appealed to the ICJ. Although, Anvillania had agreed to the jurisdiction of ICJ, it has raised objection now stating that the matter should be first referred to the domestic court and thereafter to an International Investment Tribunal as provided for in the BIT if the activities and expenses of RRPCL qualify as an investment.
19. The issues raised before the ICJ are:
  - (a) Whether ICJ has jurisdiction over the bilateral dispute between Republic of Reynes and the Republic of Anvillania and whether RRPCL and its investment in the territory of Anvillania falls within the definition of ‘investor’ and ‘investment’ respectively?

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- (b) Whether the imposition of safeguard duty and restriction on environmental clearance, are against the legitimate expectations of the Republic of Reynes since these measures are not only inconsistent with the principles of MFN and NT under GATT but also against the promise of mutual cooperation and preferential treatment as agreed upon in the TCTC and the BIT.
- (c) Whether the actions on the part of Anvillania amount to expropriation and can the Republic of Reynes claim fair compensation from the Government of Anvillania for the losses incurred by RRPCL?
- (d) Assuming that ICJ has jurisdiction whether issues (b) and (c) can be adjudicated the ICJ?
20. Both countries are parties to the ICJ Statute, all GATT/WTO agreements and all major international treaties and resolutions of the United Nations including those related to climate change and sustainable development. The Bilateral Investment Treaty signed between the two countries is identical to the new Indian Model BIT of 2016. However, neither Anvillania nor Reynes are members of the International Centre for Settlement of Investment Disputes (ICSID).