

**Maharashtra National Law University Mumbai**

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# **PROPOSITION**

**Justice M.L. Pendse National Environmental Law  
Moot Court Competition 2023**

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Maharashtra National Law University Mumbai



धर्मं तत्परता



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1. Dese is a developing country, geographically located between the Himalayas and the Indian Ocean. It has a huge coastline and diverse ecosystems within its jurisdiction. Dese is the most populated country in the world, with millions living in economic and energy poverty. The country is largely dependent on coal to meet a large proportion of its energy needs, because of its domestic coal reserves (fifth largest in the world), low cost compared to renewables, and reliability as an energy source for industrial applications and large-scale use. Dese has a fleet of 285 coal-fired power plants (second largest in the world) which meet 75 per cent of its total energy needs.
2. Dese has an agricultural-based economy with competitive manufacturing industries in areas of textiles, cement, steel, and service industries in the areas of information technology and hospitality. In recent years, Dese has been recognised as a fast developing emerging economy, and its domestic policies have centred economic growth and developing an ecosystem for manufacturing and strengthening its industry, all of which require reliable, sufficient, and affordable energy supply. In the recent decade, Dese has tried to develop its renewable energy capacity, by investing in solar, wind, and hydro power. It has launched several initiatives and policies to promote renewable energy development and production, but continues to face several challenges due lack of international investments, global supply chain shortages, and limited domestic market.
3. Since the early 2000's Dese has experienced increasing extreme weather events like cyclones, tsunamis, earthquakes, floods etc. In 2020, the western coast of the country was hit by the largest cyclone in the 21st century, leaving thousands in poverty, trauma and loss. Similarly, the average temperatures in the continent where Dese is located have continued to rise, creating several challenges for economic productivity, health of vulnerable populations, and environmental

deterioration. These events have impacted the infrastructure in Desh, its economic stability, and highlighted the need for the country to take action on the climate crises.

4. As per several reports from international and domestic research organisations, burning of fossil fuels is the principal source of rising emissions across the world. There has been a widespread demand to end the use of fossil fuels, limit the rise of average global temperature, and transition towards clean energy. Climate change has received political attention both at the global and national level. The issues of increasing air pollution, water shortage and contamination have been electoral issues at the state-level elections in Desh. Several corporations in the country have also made sustainability commitments to reduce carbon footprint and operate in a responsible manner towards the environment.
5. At the global stage, Desh is a non-annex country with the United Nations Framework Convention on Climate Change (UNFCCC) and supports the principle of common but differentiated responsibility. Desh is a Party to UNFCCC and the Paris Agreement, and has actively participated in all Conference of Parties (COP) international meetings. At the 26th COP held in Angresh in 2021, the Prime Minister of Desh made a series of bold announcements about the actions that Desh will undertake to address the climate crises. These included:
  - a. Desh will get its non-fossil energy capacity to 500 gigawatt by 2030
  - b. Desh will meet 50 per cent of its energy requirements till 2030 with renewable energy
  - c. Desh will reduce its projected carbon emission by one billion tonnes by 2030
  - d. Desh will reduce the carbon intensity of its economy by 45 per cent by 2030
  - e. Desh will achieve net zero emissions by the year 2070

6. These announcements had a mixed reception at the global level. While several stakeholders applauded Desh for making strong short-term commitments, many voices expressed doubt about the 2070 timeline adopted by Desh, claiming it was convenient and too late. Largely, there was a demand for the Prime Minister's verbal pledge to be converted into binding commitments. At the domestic level, while several ministries began preparations to implement the Prime Minister's vision, no legislative steps were taken by Desh to incorporate any of the announcements into law.
  
7. In the year that followed, Desh submitted its updated Nationally Determined Contribution (NDC) to the UNFCCC Secretariat. In line with Article 4, paragraph 9 of the Paris Agreement, which provides that each Party shall communicate a nationally determined contribution every five years in accordance with decision 1/CP.21, Desh communicated an update to its first submitted NDC (dated 2015). In its updated NDC submitted in August 2022 covering the period upto 2030, Desh included only two of the COP26 announcements, namely:
  - a. To reduce Emissions Intensity of its GDP by 45 percent by 2030, from 2005 levels.
  - b. To achieve about 50 percent cumulative electric power installed capacity from non-fossil fuel-based energy resources by 2030, with the help of transfer of technology and low-cost international finance including from Green Climate Fund (GCF).
  
8. At the international level, Desh strongly argued that it did not support a global call for 'coal phase-out' due to the adverse consequences on the development trajectory of emerging economies, such as Desh and other developing nations. It rather supported a planned 'coal phase-down' across the world, which led to Desh facing international pressure and criticism for its stance, which was further

heightened by a recent decision by the Dosh Government to build 10 new coal-fired power plants by the year 2030.

9. Koila Devi Power Station is a coal-fired thermal power plant located in Puri-Para state in Dosh. It was built between 1998-2002 under a public private partnership between the State of Puri-Para and Umbrella corporation, a trillion-dollar multinational Oil, Gas and Coal company headquartered in the UAE with a registered office in the capital city of Dosh, Swadesh. The plant has an installed capacity to produce 3,400 Megawatts (MW) and an expected lifetime of 35 years. The plant is rated supercritical in its efficiency, and provides for 30 per cent of the Puri-Para's electricity supply. Umbrella Corp made an investment of USD 80 billion in Koila Devi Power Plant in 1998-2002, in expectation of fair returns and in promise of fair and equitable treatment under the Bilateral Investment Treaty that exists between Dosh and the UAE. The plant is located in Puri-Para's capital city, Babu Nagar, an urban hotspot with a balanced mix of residential and office facilities, and shrinking stretches of green cover.
10. The residents of Babu Nagar have long complained about the poor air quality in the city and the risk of air pollution to health in the form of lung diseases, asthma, shortness of breath, etc. The complaints turned into active protests after the Government of Puri-Para in August 2022 decided to start an additional dormant unit of coal-power in the Koila Devi Power Station. The Babu Nagar Residents Association (BNRA) has claimed that after the operation of the additional unit, the Air Quality Index (AQI) of the city has been above 500 with harmful particulate matter. Local residents and media organisations have shared several scientific reports that have linked the coal power plant operations to deteriorating human health, and potential loss of life in the city. In response to these protests, the state government released a statement that the air quality in the city is generally exacerbated in the month of October-November due to

Diwali celebrations and stubble burning in the surrounding states. The state government prescribed for all people to wear masks in public, and reduce use of private Internal Combustion Engines (ICE) vehicles. Despite protests against the operation of the Koila Devi Power Station, the state government did not regulate its operations citing energy security.

11. In November 2022, ahead of the 27th Conference of Parties of the UNFCCC, the Prime Minister of Dosh announced his plans to decommission the Koila Devi Power Plant on 26 February 2023. The supporting government notification stated that this decision was being taken in pursuance of the Dosh target of net-zero by 2070 and that the Koila Devi Plant was the first plant to be shortlisted for decommissioning. The notification also stated that the Central Government was launching a National Fund to compensate those affected by the decommissioning, but did not specify the amount sanctioned by the fund, or the categories of eligible recipients.
12. In the aftermath of these announcements and the notification, the Umbrella Corporation made a public statement that unplanned decommissioning of the Koila Devi Power Station would be in breach of both the Dosh-UAE BIT and the investment contract. The decommissioning would be construed as an act of depriving the investor of the expectation of gain or profit. Such deprivation should be considered expropriation under the BIT, and should be adequately compensated. Umbrella had made an investment of USD 80 billion and expected a return of 10 percent annually, after five years of investment. They urged the Central Government to consider the potential economic losses. The lawyer for Umbrella Corporation, Mr Kazir Hoishi questioned the legality of the Dosh government's net-zero target and suggested that actions undertaken in furtherance of a mere announcement were unconstitutional. He further highlighted the Dosh-UAE Bilateral Investment Treaty which protected the

investment made by the Umbrella Corporation and subjected the Government of Desh to cover the damages in case of decommissioning.

13. The Koila Devi Workers Association (KDWA), a registered labour union of power plant workers made a public statement about their grievances and displeasure about the decommissioning announcement. Their statement highlighted the drastic impact on livelihoods the decision will cause, including the dependency of their community on the power plant for their sustenance. The leader of the association, Ms Charmeel Falebi demanded that the decommissioning process be a just transition where labour rights should be considered for compensation for loss of jobs for the workforce, compensation for the economic loss suffered by dependent communities, creation of new economic opportunities by reskilling of the workforce, and government support for resettlement.
  
14. The BNRA made a public statement welcoming the decision to decommission the Koila Devi plant, and brought attention to the adverse health impacts that the decommissioning process will pose, if not managed properly. The Head of BNRA, Mr Rakha Gosi highlighted the need for a range of measures including an Environmental Management Plan and an Environmental Impact Assessment report for the decommissioning process. They asserted that in the absence of proper government guidelines on decommissioning coal plants, the government must ensure safe management, handling and disposal of hazardous substances as well as the dismantling, reclamation and disposal of scrapped thermal power plant site and structures, as it could pollute water, air and soil in the areas any hazardous substances seep through, and lead to spreading of diseases. They highlighted the polluter pays principles in demanding compensation from the Umbrella Corporation on the damage caused to the natural environment. The BNRA made an additional claim that its residents be compensated from the

National Fund for damages already incurred by the operation of the power plant, and for any future damages they may incur for improper dismantling of Koila Devi.

15. In December 2022, BNRA approached the Supreme Court of Desh under Article 32 of the Constitution, claiming that the residents' right to healthy air under the Air (Prevention and Control of Pollution) Act, 1981 had been violated. They alleged that the Umbrella Corporation and the Puri-Para State Government were liable for causing detrimental health impacts and endangering the quality of life under Article 21 of the Puri-Para residents by the continued operation of the power plant. They requested the court to grant adequate compensation for health damages caused by the operation, and those expected to take place in the dismantling process of the power plant to protect the right to life of the residents.
16. In their response to the petition, the Umbrella Corporation stated that in January 2002, the government of Desh had approached Umbrella, requesting mutual benefits of investing in the coal industry in India, under an Investment Contract between the Government of Desh and Umbrella Corporation. The contract bars settlement of disputes concerning the investment and operation of the coal-power plant, through domestic courts. Article 10 of the Investment Contract states the following: *“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”*
17. The Umbrella corporation contested that the Supreme Court of Desh is not the appropriate forum to adjudicate issues arising out of or in connection with Power Plant. The corporation further challenged the submission of the case to

the domestic court on the basis of the Desh-UAE BIT, claiming that the case requires implementation and interpretation of international investment law, such as “fair and equitable treatment”, “expectation of gain or profit” and “expropriation”. It asserted that the Supreme Court is not the appropriate forum to discuss these principles, especially in violation of the dispute resolution clause of the Investor Contract.

18. The Umbrella Corporation also claimed that the decision of the Central Government was unfounded in law as there was no domestic law on decommissioning or net-zero target in Desh. It further emphasised that a multinational corporation is an investor in the coal-power plant and fundamental rights cannot be invoked against a private corporate actor.
19. The Puri-Para State government challenged the maintainability and jurisdiction of the BNRA application stating that the National Green Tribunal (NGT) is the appropriate forum to address environmental law related issues and that the petitioners should exhaust all the alternative remedies before approaching the apex court of the country. BNRA in their public response, stated that they have not approached the NGT because the case does not directly involve any legislation covered under schedule 1 of the NGT Act, 2010 and is a question of policy rather than legislation.
20. The Puri-Para State Government defended its position by stating that the Koila Devi power plant is providing electricity to residents of Desh and allowing people to enjoy their right to electricity which is also a fundamental right under article 21 of the Constitution. Additionally, it argued that electricity allows people to exercise their right to development. The State of Puri-Para further questioned the bindingness and the applicability of the net-zero announcement made in 2021, as it had not been incorporated in domestic law. It asserted that

electricity is a concurrent subject in the Constitution of Desh, which vested the responsibility of distribution with States. The Central Government, despite being responsible for facilitating efforts of States to provide power to consumers in an improved manner, had violated its objectives by putting the residents and businesses of Puri-Para at risk of energy poverty and lack of basic services.

21. In December 2022, the KDWA filed a public interest litigation under article 32 against the Central Government seeking compensation for the workers and the dependent community due to the loss of livelihood from the decommissioning process. They stated that the Central Government's policy of decommissioning the power plant will cause undue loss of livelihood under article 21 of the constitution, and should not proceed without provisioning for the rights of the workers under the Workmen Compensation Act, 1923.
22. The Central Government defended its decision to decommission the Koila Devi Power Plant on grounds of Desh's international obligations under the Paris Agreement to the UNFCCC, the updated NDC submitted by Desh, and the Net-zero 2070 target. It argued that notification of decommissioning the Koila Devi Power Plant has been drafted under section 3 of the Environment Protection Act, 1986 which authorises the Central Government to protect and improve the environment. The Government further stated that it would appoint a committee of experts to oversee the decommissioning process, and award compensation on a case by case basis to affected parties.
23. The Supreme Court of Desh after receiving all petitions decided to club them together. The matter is listed to be heard before Hon'ble Supreme Court.

## Note:

- Participants are expected to identify the parties and the issues involved in the matter.
- All laws and regulations in Dosh are *pari materia* to India. The terms of the Dosh-UAE Bilateral Investment Treaty are the same as the India-UAE Bilateral Investment Treaty.



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