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WTO CASE: SOLAR ENERGY PANEL CASE

INDIA vs US

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WTO CASE: SOLAR PANEL CASE
INDIA VS US

Abstract

The Solar Panels dispute between the US and India before the WTO made huge waves at a time when India had gone from having virtually no solar capacity to boasting of being one of the world's fastest growing solar industries. On the heels of the recent global summit in Paris to tackle climate disruption, the WTO has ruled against an important piece of the climate solution puzzle: India's ambitious program to create home-grown solar energy. [1]

The US challenged the Jawaharlal Nehru National Solar Mission[2] at the WTO alleging that India's power purchase agreements with solar power developers mandated the use of India-manufactured solar cells and modules, which would amount to a forbidden domestic content requirement under India's WTO obligations. In September 2016, India lost the appeal it had filed against the WTO Panel Ruling.

This paper attempts to simplify the Appellate Body and Panel Reports so as to present the issues involved broadly, the arguments of the parties and the findings in the simplest manner possible and yet bring out the significance of the decision. The paper presenter also seeks to place the decision against the context of the global movement towards addressing climate change issues by pushing for cleaner energy.

The present piece of work is divided into three parts. Part I accords a brief outline of the technicalities of the legal dispute, Part II looks into the arguments of the parties before the WTO Appellate Body and its findings, and with Part III, the author offers a conclusion.

[1] Gladwin Issac, Trishna Menon: When Good Intentions Are Not Enough: Revisiting the US-India Solar Panels WTO Dispute

[2] Jawaharlal Nehru National Solar Mission: Towards Building Solar India, Government of India: Ministry of New and Renewable Energy, http://www.mnre.gov.in/solar-mission/jnnsm/introduction-2/See generally, Jawaharlal Nehru National Solar Mission: Phase II- Policy Document, Dec, 2012, http://mnre.gov.in/file-manager/UserFiles/draftjnnsmpd-2.pdf

Introduction

An evolution of considerably promptly industrialised economies in the renewable energy sector has led to an increasingly globalised supply chain, and subsequently, an extreme expansion in the international trade of renewable energy technologies. This possibly justifies the recent emergence of trade-related disputes in the renewable energy sector via the World Trade Organisation. Most renewable energy technologies, including wind and solar power, require some form of government support in order to be deployed. While any form of direct government support that constitutes a subsidy could run into conflict with international trade rules, it is the programs that aim to simultaneously foster the growth of a domestic manufacturing industry which are most at risk of such conflict.

Amidst, a prospect to establish India as a global leader in solar energy, the Government of India launched the Jawaharlal Nehru National Solar Mission in 2010, targeting a generation of 100,000 megawatts of grid connected solar power capacity by 2022, which policy irked the US enough that it was taken to the WTO. The Jawaharlal Nehru National Solar Mission aimed at reducing the cost of solar power generation in India and increasing India's solar capacity. India imposed a Domestic Content Requirement with respect to solar cells and modules used in the projects. The project aimed at establishing India as a global leader in solar energy, by creating the policy conditions for its diffusion across the country.

This paper attempts to simplify the Appellate Body and Panel Reports so as to present the issues involved, the arguments of the parties and the findings to bring out the significance of the decision.

Circumstances of the dispute

In February 2013, the United States, in accordance with Article 4.4 of the Dispute Settlement Understanding ("DSU") requested consultations with India, related to certain measures concerning domestic content requirements under the Jawaharlal Nehru National Solar Measures ("NSM") for solar cells and solar modules. The United States stated that participation in the National Solar Mission required the solar power developer to purchase and use solar cells and solar modules of domestic origin[3].

3 India - Certain Measures Relating to Solar Cells and Solar Modules at

Measures at Issue:

The United States further stated that India's measures appeared to be inconsistent with:

- **Article III:4 of the General Agreement on Tariffs and Trade** ("GATT") because the measures appear to provide less favourable treatment to imported solar cells and solar modules than that accorded to like products originating in India;
- **Article 2.1 of the TRIMs Agreement** because the measures appear to be trade-related investment measures inconsistent with Article III of the GATT 1994;
- **Articles 3.1(b) and 3.2 of the SCM Agreement** because the measures appear to provide a subsidy contingent upon the use of domestic over imported goods; and
- **Articles 5(c), 6.3(a), and 6.3(c) of the SCM Agreement** because the measures appear to cause serious prejudice to the interests of the United States through displacement or impedance of imports of U.S. solar cells and solar modules into India and through lost sales of U.S. solar cells and solar modules in India.

The United States concluded by stating that India's measures nullified or impaired the benefits that should have directly or indirectly accrued to the United States.

Timeline of the Matter

Thereafter following the consultations, which were held in April 2014, the United States requested the establishment of a Panel to look into the matter. With respect to it, Brazil, Canada, China, the European Union, Japan, Korea, Malaysia, Norway, the Russian Federation and Turkey reserved their third party rights. In the aftermath Ecuador, Saudi Arabia and Chinese Taipei reserved their third party rights. Following the agreement of the parties, the Panel was composed on 24 September 2014[4].

In February 2016, the Panel Report was circulated to Members. On 20 April 2016, India notified the Dispute Settlement Body ("DSB") of its decision to appeal to the Appellate Body certain issues of law and legal interpretation in the Panel Report. On 16 September 2016, the

https://doi.org/10.30875/444bfd23-en
[4]https://www.wto-ilibrary.org/dispute-settlement/india-certain-measures-relating-to-solar-cells-and-solar-modules_444bfd23-en

Appellate Body report was circulated to Members. On 8 November 2016, India informed the DSB that, pursuant to Article 21.3 of the DSU, it intended to implement the DSB's recommendations and rulings in this dispute[5].

A Discussion of the Findings of the Appellate Body and the Panel

The Complainant state, that is, the United States, alleged that India's DCR measures are inconsistent with Article III[6]: 4 of the GATT and Article 2.1 of the Agreement on Trade-Related Investment Measures ("TRIMs Agreement")[7]. This section of the Analysis proceeds to discuss the issues arising in this dispute as correlated with the provisions of the relevant multilateral trade agreements.

This is the article of the GATT that deals with National Treatment. It reads as below:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product." [8]

The United States claimed that the DCR measures at issue are violative of Article III: 4, which is targeted at reducing protectionism among nations. India, in defence, claimed that the DCR measures were not violative of Article III: 4 of the GATT since the derogation under Article III:8(a) would be applicable to the measures at issue.

5 When Good Intentions are Not Enough: Revisiting the US-India Solar Panels WTO Dispute :OIDA International Journal of Sustainable Development, Vol. 10, No. 02, pp. 37-44, 2017; See at:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971690

6 Article III: 4, The General Agreement on Tariffs and Trade, Posted: 1994

7Agreement on Trade-Related Investment Measures (TRIMs); See at:

https://www.wto.org/english/tratop_e/invest_e/trims_e.htm

8 World Trade Organization (1994). Article III: 4, The General Agreement on Tariffs and Trade. Geneva.

Legal aspects in the dispute

Article III: 8 (a) of the GATT

Commonly, Article III:8(a) allows that the provisions of Article III of the GATT would not be applicable to laws governing procurement by governmental agencies of products purchased for government purposes and not for commercial resale.

"The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."[9]

The Panel Report had found that the measures at issue were indeed violative of GATT Article III:4 and that the measures were not covered by the derogation under GATT Article III:8(a)[10].

A two-pronged issue was raised with respect to GATT Articles III:4 and III:8(a):

• Whether the measures at issue were indeed not covered by the derogation under GATT Article III:8(a), and

• If the Appellate Body reversed the finding of the Panel, with respect to the applicability of GATT Article III:8(a), whether the Appellate Body can complete the legal analysis and find that the remaining provisions of the article are satisfied.

The analysis behind the Panel's finding was that while the Indian government procured electricity, the discriminatory DCR measures were in relation to solar cells and modules. India appealed this finding on the basis that the Panel had failed to make an objective assessment of the matter, thus acting inconsistently with its obligations under Article 11[11] of the DSU.

[9] World Trade Organization (1994). Article III: 8(a), The General Agreement on Tariffs and Trade. Geneva.

[10] Paragraph 8.2.a, Panel Report. India — Certain Measures Relating to Solar Cells and Solar Modules. WT/DS456/R.

[11] The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Before the Appellate Body: Scope of Article III:8(a)

On appeal, India conferred several arguments to prove that the Panel had mechanically applied the 'competitive relationship' test and refused to consider the facts, evidence and legal arguments India put forth.

India contended that its primary leg of argument was that the solar cells and modules were "indistinguishable" from solar power generation. While reiterating the other arguments discussed in the previous paragraphs, India went on to state finally, that the Panel had erred in holding that it could not go beyond the tests laid down in *Canada—Renewable Energy*[12] simply because India had not specifically asked it to deviate from this reasoning.

The Appellate Body reiterated the Panel's stand on India's argument on the scope of Article III:8(a). It rejected India's stand that a consideration of inputs and processes of production displaces the 'competitive relationship' test. Under Article III:8(a) of the GATT 1994, the foreign product discriminated against must necessarily be in a competitive relationship with the product purchased by way of procurement.[13]

Also, India further argued that if the Panel read "procurement" as "direct acquisition" of the product, it would be an unnecessary intrusion into the nature and exercise of governmental actions. The Panel responded to this concern by stating that even if the measures at issue were of the nature of "direct acquisition", they need not be compliant with the other requirements of Article III:8(a). The Appellate Body, thus rejected India's claim that the Panel acted inconsistently with regard to Article 11 of the DSU in assessing India's arguments regarding the scope of application of Article III:8(a) of the GATT 1994. The Appellate Body also upheld the Panel's findings that the DCR measures are not covered by the derogation under Article III:8(a) of the GATT 1994.

[12] Appellate Body Report. Canada -Measures Relating to the Feed-in Tariff Program

[13] WTO (2016), *India - Certain Measures Relating to Solar Cells and Solar Modules: Report of the Appellate Body*, WTO, Geneva, https://doi.org/10.30875/691b5d36-en.

Another Component of Article III:8(a).

As part of its appeal, India had requested that the Appellate Body complete the legal analysis of the abovementioned provision. The Appellate Body, however, noted that this request was based on the premise that the Panel's findings on the DCR measures being covered under Article III:8(a) would be reversed by it. This not being the case, the Appellate Body did not condescend to address India's further claims and arguments.

GATT: Article XX: (j).

"*Essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.".*[14]

With respect to the scope of Article XX: (j) of the GATT 1994, Caim was made by India before the Panel that a situation of short supply can exist where a "*product is not produced or manufactured in a particular market*". In light of India's move to seek energy security and ecologically sustainable growth, acquisition or distribution of indigenously manufactured solar cells and modules became essential. Assessing this claim, the Panel first interpreted the phrase "products in general or local short supply" to mean a situation in which the quantity of available supply of a product does not meet demand in the relevant geographical area or market.

Further, the Panel went on to determine whether a lack of domestic manufacturing capacity amounts to solar cells and modules being in "general or local short supply" within the meaning of *Article XX: (j). It noted that ""the words 'products in general or local short supply' do not refer to 'products of national origin in general or local short supply'." In denying India's claim, the Panel noted that such an interpretation would amount to "a far-reaching principle*

[14] World Trade Organization (1994). Article XX: (j), The General Agreement on Tariffs and Trade. Geneva

that all members are entitled to an equitable share in the international production of products in short supply".

Henceforth, it was noted by the Panel that for the purposes of making a determination under Article XX: (j) of the GATT 1994, an objective assessment of whether there is a deficiency or amount lacking in the quantity of a product that is available and held that India's interpretation of Article XX: (j) does not present any objective point of reference to serve as the basis for an objective assessment of whether a product is in 'short supply'. The Panel, therefore concluded that the DCR measures do not involve the acquisition of "products in general or local short supply in India within the meaning of Article XX: (j) and thus are not justified under the general exception in that provision.

The Appellate Body held that the fact that India does not agree with the conclusion of the Panel does not mean that the Panel committed an error amounting to a violation of Article 11 of the DSU. Further, the Appellate Body held that in doing so, India's is merely recasting its arguments before the Panel under the guise of an Article 11 claim and rejected it.

GATT: Article XX: (d) "*Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices."*[15]

India had identified certain international and domestic instruments as the laws and regulations with which the DCR measures were to secure compliance. The following **international instruments** were identified by India:

• the preamble of the WTO Agreement,[16]

• the United Nations Framework Convention on Climate Change,

• the Rio Declaration on Environment and Development (1992), and

• UN Resolution A/RES/66/288 (2012) (Rio+20 Document: "The Future We Want")

15 **Article XX(d)** establishes a general exception for measures: necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article xvii, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.

16 Global trade rules; See at:https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htmh

The following were the **domestic instruments** identified by India:

• Section 3 of India's Electricity Act, 2003, read with

• paragraph 5.12.1 of the National Electricity Policy,

• subsection 5.2.1 of the National Electricity Plan, and

• the National Action Plan on Climate Change

The Panel chose to consider these instruments separately, since India claimed that different issues would arise with respect to both sets of instruments.

In case of International Instruments, India contended that the "direct effect" of the identified international instruments under its domestic legal system is established by the fact that "the principles of sustainable development under international environmental law have been recognized by the Supreme Court of India to be part of the environmental and developmental governance in India".

The Appellate Body stated that the mere fact that the executive branch takes actions in pursuance of the international instruments at issue is not sufficient to demonstrate that such international instruments fall within the scope of "laws or regulations" under Article XX(d). Here too, the Panel's findings were upheld.

Further dealing with the domestic instruments, India, while admitting that the policies are non-binding, stated that they are nonetheless "laws" because the legal framework in India consists of both "binding" laws and policies, which provide the basis for executive action. The Appellate Body read the relevant paragraphs of the Policies and Plans, and found that reading them together, it could not be said that they constituted a "rule". The Appellate Body agreed with the Panel on its understanding of this provision.

Conclusion

At a time when India is forging an ambitious security alliance with the US, including cooperation on solar energy and climate-change issues, the Appellate Body's ruling is a sober reminder that in the mercantile trading framework, bilateral considerations and climate change issues are subservient to the interests of the developed world[17].

Despite being aware of Washington's DCR policies and subsidy programs for the renewable energy sector, India has remained silent for the past three years[18]. It is only in early 2017, that India initiated a major trade dispute against the US with respect to DCR measures put in place by eight states of the United States.[19]

In the month of June, the WTO dispute resolution panel ruled in favour of India, "*saying that America's domestic content requirements and subsidies provided by eight of its states in the renewable energy or the solar sector are violative of global trade norms*".

[17] Issac and Menon / OIDA International Journal of Sustainable Development 10:02 (2017)

[18] Kanth, D.R., India's appeal against WTO solar ruling rejected (2016, September 16), Live Mint. Retrieved from http://www.livemint.com/.

[19] Request for the establishment of a panel by India. United States — Certain Measures Relating to the Renewable Energy Sector. WT/DS510/2.