When Good Intentions Are Not Enough: Revisiting the US-India Solar Panels WTO Dispute

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OIDA International Journal of Sustainable Development, Ontario International Development Agency, Canada
ISSN 1923-6654 (print) ISSN 1923-6662 (online) www.oidaijsd.com
Also available at http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html

Abstract: The US-India Solar Panels dispute, before the WTO, made 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.

The US challenged the Jawaharlal Nehru National Solar Mission at the WTO alleging that India's power purchase agreements with solar power developers mandated the use of India-manufactures 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.

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 adverse 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. In addition to this, The ruling has come under severe criticism, from environmentalists, as undermining India's efforts towards promoting the use of clean energy. However, there appears to be no rational basis for how mandatory local content requirements contribute towards promoting the use of clean energy as solar power producers should be free to choose energy-generation equipment on the basis of price and quality, irrespective of whether they are manufactured locally or not.

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 authors also seek 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 gives a broad overview 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 authors offer a conclusion.

Keywords: Domestic Content Requirements; India-US Solar Panels; Renewable Energy; WTO

Introduction

Worldwide, over 1.3 billion people lack access to electricity and another 1 billion have unreliable access, with enormous consequences for their everyday lives. Although progress has been slow on reaching a global agreement to address human-caused climate change, recent years have seen renewable energy gaining traction as an important area of focus for governments worldwide. An emergence of several rapidly industrialised economies in the renewable energy sector has led to an increasingly globalised supply chain, and subsequently, a sharp increase in the international trade of renewable energy technologies. This possibly explains 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.

With a view 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 US enough that it was taken to the WTO.

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An Overview of the Facts and 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.

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

Pursuant to the consultations, in April 2014, the United States requested the establishment of a Panel to look into the matter. Brazil, Canada, China, the European Union, Japan, Korea, Malaysia, Norway, the Russian Federation and Turkey reserved their third party rights. Subsequently, 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.

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 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.

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: 4 of the GATT and Article 2.1 of the Agreement on Trade-Related Investment Measures ("TRIMs Agreement"). 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." [1]
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.

Article III: 8 (a) of the GATT

Very simply, 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." [2]
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) [3].
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 of the DSU.

Mechanical Application of 'Competitive Relationship' Standard

India claimed before the Appellate Body, that the Panel had mechanically applied the 'competitive relationship test' on the basis of which *Canada — Renewable Energy* was decided. The 'competitive relationship test' essentially says that for the derogation under Article III:8(a) to apply, the product "subjected to discrimination" (in this case, the solar modules and solar cells) and the "product that is purchased" by the government under the measures at issue (here, electricity generated using the solar modules and solar cells) must be: identical products, like products or products that are directly competitive or substitutable, or, in other words, "products that are in a competitive relationship" [4].

At the level of the Panel, India's argument was not accepted. The Panel had noted that India had not specifically argued that electricity and solar cells and modules were in a "competitive relationship". India had also not requested that the Panel depart from the reasoning followed in Canada—Renewable Energy. Instead, India argued that measures at issue in this case could be distinguished from those in Canada—Renewable Energy: this was since in this case, the Central Government was effectively procuring the solar cells and modules by purchasing the electricity.

India's argument that it was "effectively procuring" solar cells and modules through the DCR measures rests on what it considered to be a key factual distinction with *Canada—Renewable Energy* involving "the nature of the products in question". India stressed that the DCR measures are applicable only to solar cells and modules, as opposed to the facts in *Canada—Renewable Energy* where the domestic content requirements were applicable on a wide range of equipment and services required to construct and maintain a solar power generation system [5].
India also contended before the Panel, that Article III:8(a) does not, in all cases, require a 'competitive relationship'. The Panel observed that in Canada—Renewable Energy, the Appellate Body referred to "inputs and processes of production" as being potentially relevant to deciding whether a competitive relationship exists between parties. India argued, in the instant case, that the 'inputs' understanding was an alternative to the 'competitive relationship' test. While India argued that solar cells and modules are an input to the generation of solar power, the United States maintained that solar cells and modules were only capital equipment that was not incorporated into the solar power generated. The Panel did not, however, resolve this question, since these were issues that the Appellate Body considered unnecessary to resolve in Canada—Renewable Energy. Instead, the Panel simply applied the rationale of

Canada—Renewable Energy to this case, in light of very similar facts, that is, discussing whether electricity and generation equipment are in a competitive relationship.

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

On appeal, India presented several arguments to justify 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* 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.

Integral Inputs Understanding as an Alternative Test

India also attempted to argue that solar cells and modules are "integral inputs" to the generation of electricity as opposed to other equipment, which could be classified as "ancillary". However, the Panel chose not to engage with this construction as well, by placing reliance on the fact that in Canada—Renewable Energy, the "exact same" products, that is, solar cells and modules were used in electricity generation. The Panel held in this case, that there was no indication in Canada—Renewable Energy of such equipment being "integral" that would be relevant for an analysis with respect to Article III:8(a).

Before the Appellate Body

While India maintained that the Panel did not sufficiently recognise the parties' disagreement on the understand of "integral inputs", the Appellate Body agreed with the Panel that an understanding of integral inputs would be irrelevant, in this case, to an analysis of Article III:8(a).

'Procurement' as 'Direct Acquisition'

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.

Before the Appellate Body

The Appellate Body found that, in presenting this argument, India was, in essence, reiterating its arguments on "integral inputs" being covered under Article III:8(a). In deciding on this argument, the Appellate Body reiterated that for Article III:8(a) to apply, the product purchased should always be in a competitive relationship with the product discriminated against [6].

Other Elements of Article III:8(a).

India had, as part of its appeal, 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 deign 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." [7].

As regards the scope of Article XX: (j) of the GATT 1994, India claimed 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 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 that all members are entitled to an equitable share in the international production of products in short supply".

The Panel noted 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.

In its appeal, India requested the Appellate Body to find that the Panel erred in its interpretation of the phrase products in general or local short supply "because it did not read 'short supply' in Article XX: (j) in the context of the specific terms used in that provision, that is, 'general or local'", and instead adopted an "approach that interpreted the words 'general or local' in isolation of the words 'short supply'. India argued that the use of the terms "general or local short supply" in Article XX: (j) "contemplates short supply that is distinct from situations that can be addressed by 'international supply'". It reiterated its fundamental argument that 'general or local short supply' exists in the first place due to low domestic manufacturing" and its vulnerability "to the risks associated with international supply and market fluctuations".

India also put forth allegations that the Panel acted inconsistently with Article 11 of the DSU while rejecting its arguments regarding the concept of "sufficient manufacturing capacity". India contended that it presented evidence of what would constitute "sufficient manufacturing capacity" that would enable discontinuation of the DCR measures and maintains that "India does not intend for the DCRs to be applied indefinitely.
Against this, the United States requested the Appellate Body to uphold the Panel's finding, submitting that the term "products" in Article XX: (j) "is unqualified by origin, indicating that it addresses supply of that product without respect to origin or 'source of supply'.

The Appellate Body sought to interpret Article XX: (j) of GATT 1994, in consonance with the preamble of the Marrakesh Agreement as reflecting a balance of different considerations to be taken into account when assessing whether products are "in general or local short supply". More specifically, a panel should examine the extent to which a particular product is "available" for purchase in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market. In all such cases, the responding party has the burden of demonstrating that the quantity of available supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand.

Denying India's claim, the Appellate Body confirmed the Panel's decision that solar modules and cells are not in short supply in India. The Appellate Body rather interpreted Article XX: (j) of the GATT 1994 as reflecting a balance of different considerations to be taken into account when assessing whether products are "in general or local short supply".

With regard to India's claim of the Panel acting inconsistently with Article 11 of the DSU, 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, trade marks and copyrights, and the prevention of deceptive practices." [8].
The Panel had found that the DCR measures applied by India were not measures to secure compliance with laws or regulations which were not inconsistent with the provisions of the GATT 1994. India appealed this finding before the Appellate Body.
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,
- 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")

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.

With regard to the International Instruments

The Panel first considered whether "laws and regulations" include international instruments. The Panel based its decision on the Appellate Body decision in *Mexico — Taxes on Soft Drinks* [9], in which the phrase "laws or regulations" in Article XX(d) referred to "rules that form part of the domestic legal system of a WTO Member". The Panel, in this case, added that international agreements (or other sources of international law) may constitute "laws or regulations" only as far as they have been incorporated, or have "direct effect", within a Member's domestic legal system.

India had claimed, before the Panel, that these instruments did have "direct effect" on its domestic legal system because rules of international law become part of the domestic legal system without express legislative sanction, so long as they do not conflict with any law enacted by Parliament. However, the Panel found that these international obligations are not "automatically incorporated", but rather, that they may be implemented by certain authorities. On this basis, the Panel rejected the first half of India's claim and moved on to consider the domestic instruments.

Before the Appellate Body

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.

With regard to the Domestic Instruments

The Panel began by understanding the dictionary definition of the words "law" and "regulation" to conclude its analysis by holding that the laws and regulations referred to in GATT Article XX(d) are "legally enforceable rules of conduct under the domestic legal system of the WTO Member concerned, and do not include general objectives".
While the Panel agreed that Section 3 of the Electricity Act, 2003 had the characteristics of a "statute", and is a legally enforceable basis for the Policies and Plans enlisted by India, the Panel also noted that the section does not address the substance of the Policies and Plans.

In contrast to this, the Panel noted that National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change are expressly entitled a "policy" or "plan", and that the language of the instruments does not suggest the existence of any legally enforceable rules.
Based on its analysis, the Panel found that Section 3 of the Electricity Act constitutes a 'law' for the purposes of

Article XX(d), while the other domestic instruments identified by India do not quality as "laws or regulations".

Before the Appellate Body

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: On US Doublespeak

While the Panel and the Appellate Body were right in their decision, the United States' doublespeak on DCR measures needs to be highlighted. At a time when India is forging an ambitious security alliance with the US, including cooperation on solar energy and climate-change issues, the AB'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.

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 [10]. 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 [11].

Nonetheless, although Prime Minister Modi's calls for 'Make in India' are loud and clear, it is in its own best interests that India does not resort to protectionist measures which are inconsistent with its international obligations. Domestic content measures, despite their immediate political gains, have a tendency to skew competition. Manufacturers must remain free to select inputs based solely on quality and price, irrespective of the origin. The Modi government must continue working towards building a business and regulatory environment which is conducive to manufacturing, as it purports to do. This would require systemic changes in the form of simpler, transparent and consistent laws and effective dispute resolution mechanisms.

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