Lost Illusions: India's Solar Cell Case at the World Trade Organization

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Abstract: Technology and law have long shared an intimate relationship. From industrialization to globalization, technological innovations have brought disruptive change to the existing systems and have at times helped mankind. Renewable energy technologies such as solar have gained popularity and many countries around the world are initiating programmes for promoting renewable energy. The Government of India launched National Solar Mission in 2010 for creating a robust environment in order to establish India as a global leader in solar energy. WTO has proved itself to be the most successful international forum as it provides for a unique, robust and time bound Dispute Settlement Body (DSB) and is the flag bearer of global governance in matters of trade having non-discrimination as one of its basic principles. However, the Panel and the Appellate Body of the DSB ruled against India in a case initiated by the US against the said 'National Solar Mission' policy alleging that it is discriminatory in nature. The paper is explanatory in nature and aims at explaining the intricacies of international trade law involved in the dispute. The paper deals with India's stand at the WTO regarding environmental issues. Paper also specifically deals with the case and discusses in detail the factual aspect, claims and finding, also explaining the analysis of various defences or exceptions raised by India and the jurisprudence and reasoning provided by the Panel or the Appellate Body.

Key words: WTO, Environment, Solar Cells, TRIMS, G-20.

Introduction

Renewable energy technologies such as solar have gained popularity. Many countries around the world are initiating programmes for promoting renewable energy. The government of India launched National Solar Mission in 2010 for creating a robust environment in order to establish India as a global leader in solar energy. On 16th September, 2016, the Appellate Body of the Dispute Settlement Body (hereinafter referred to as 'DSB') of the World Trade Organization (hereinafter referred to as 'WTO'), comprising of Peter Van den Bossche (Presiding Member), Seung Wha Chan and Thomas Graham, upheld the Panel's decision on the case of India - Certain Measures Relating to Solar Cells and Solar Modules initiated by the US. US argued that under the said mission India accorded less favourable treatment to the imported 'like products'. The WTO Panel as well as Appellate Body has decided against India. This was a major blow to India's "Make in India" campaign. This paper highlights the key issues involved in the case. Efforts have been made, to explain the WTO jurisprudence in a nutshell and to analyze the decision in the light of well established principles of WTO jurisprudence. The decision has been heavily criticized by environmentalists. In order to analyze the decision, one has to understand the general principles of WTO law and specific provisions of the Agreement on Trade-Related Investment Measures (TRIMs).

The paper is explanatory in nature and aims at explaining the intricacies of international trade law involved in the dispute. Part II of the paper deals with India's stand at the WTO regarding environmental issues by relying on the negotiating history as available in the public domain. Part III of the paper explains in brief the agreement of the WTO applicable to the case i.e. the TRIMS Agreement and the obligations under the agreement. Part III specifically deals with the case and discusses in detail the factual aspect, claims and findings also explaining the analysis of various defenses or exceptions raised by India and the jurisprudence and reasoning provided by the Panel or the Appellate Body. Finally, Part IV provides the conclusion (critique) along with an alternative approach. The paper relies on the legal research methodology taking into consideration the 'case-laws' and the jurisprudence along with the secondary sources for historical analysis.

* The author was awarded Professor Radha Kamal Mukherjee Young Social Scientist Award in the contest held during 4th STS International Conference from January 12-13, 2019 held at Indore.

India and the Environment Negotiation at WTO

When India was in the initial phases of liberalisation, it was forced to bring its laws, policies and regulations into conformity with the WTO via the Uruguay Round of trade negotiations (1986–94) as well as the multilateral agreement of the General Agreement on Tariffs and Trade (GATT). At that point, India always took a stand against including environmental issues in the WTO since India was apprehensive that other nations would restrict market access for Indian products under the pretext of environmental protection. However, there was great momentum for environment issues to be sheltered under the WTO. One of the major factors that provided necessary force for this approach was the Tuna Dolphin (Panel Report, 1991) dispute in 1991 which made environmentalists feel that trade hinders environmental conversation. Their efforts made the GATT Director-General to convene the GATT Environmental Measures and International Trade (EMIT) group in 1991 which was inactive since its formation in 1971. Additionally, in 1992 the United Nations (UN) Conference on Environment and Development was held and further strengthened trade and environment linkage[1]:

> "An open, equitable, secure, non-discriminatory and predictable multilateral trading system that is consistent with the goals of sustainable development and leads to the optimal distribution of global production in accordance with comparative advantage is of benefit to all trading partners. Moreover, improved market access for developing countries' exports in conjunction with sound macroeconomic and environmental policies would have a positive environmental impact and therefore make an important contribution towards sustainable development."

At the WTO, it is the QUAD, which would mostly take decisions in the course of trade negotiations. Initially the QUAD comprised of the US, EU, Canada and Japan and thus, India's efforts against including environment in the WTO went in vain. It was decided that the WTO Committee for Trade and Environment (CTE) will take the charge from the EMIT Group subsequent to the Ministerial Decision in Marrakesh in April 1994. It was further clarified that the

CTE was open to all WTO members and selected observers from inter-governmental organisations. Certainly, it came to pass that trade-related environmental issues were to adhere to the WTO framework, the work programme of the CTE was to encompass MEAs and WTO rules, dispute settlement and MEAs, environmental policies related to market access, taxes, technical regulations and labelling, transparency, domestically prohibited goods, intellectual property and services. Between 1996 and 1998, the fears of India for keeping environment under the WTO became evident with the outcome of the infamous Shrimp Turtle case (Panel Report, 1998). The US restricted shrimps exports from certain developing countries, including India, from the US market in 1996[2] under the excuse that such shrimp was not being caught in an environmentally friendly manner, as per the standards of the US.

India along with other complaining parties[3] viewed the measure as a disguised restriction on trade that discriminated against the goods on the basis of its production and processing methods (PPMs), thus violating provisions of the GATT 1994. The US argued that the prohibition was to conserve natural resources under Article XX(g) of GATT, which related to the conservation of exhaustible natural resources. After the failure of initial consultations at the WTO dispute settlement body (DSB), a WTO Panel was composed in 1997 that circulated its report in early 1998 (Panel Report, 1998). The Panel ruled in favour of the complaining parties that the US measure was inconsistent with Article XI: I of the GATT 1994.

However, the US appealed this decision and the WTO Appellate Body reversed the Panel's findings, ruling that the US restriction was within the scope of measures permitted under Article XX and justified under Article XX(g), though the Member had failed to meet the requirements of the chapeau[4] (the introductory paragraph) of Article XX, which defines when the general exceptions can be cited (Panel Report, 1998). That is, the action by the US was discriminatory because while it provided countries in the western hemisphere, mainly in the Caribbean, technical and financial assistance and longer transition periods for their fishermen to start using turtle-excluder devices, it did not give the same advantage to the four Asian

countries (India, Malaysia, Pakistan and Thailand) that filed the complaint with the WTO (Mehta, 2007).

This report aggravated the fears of India along with other developing countries. Further, Indian economists and trade policy-makers claimed that while India supported sustainable development, it wanted to prevent developed countries using environmental standards for trade restrictive purposes. Indian Minister of Commerce and Industry, Murasoli Maran told the Seattle Ministerial conference in 1999 (Statements by Minister, 1999):

> "India in good faith had agreed at Marrakesh to the establishment of a WTO Committee on Trade and Environment. We would, however, strongly oppose any attempt to either change the Committee's structure or mandate which can be used for legitimizing unilateral trade restrictive measures. Attempts aimed at inclusion of environmental issues in future negotiations go beyond the competence of the multilateral trading system and have the potential to open the floodgates of protectionism."

Or as T.N. Srinivasan, explained

> "If Brazilian rain forests must be saved to minimize the cost of a targeted reduction in carbon dioxide emissions in the world, while the US keeps guzzling gas because it is too expensive to cut that down, then so be it. But then this efficient cooperative solution must not leave Brazil footing the bill! Efficient solutions, with the compensation and equitable distribution of the gains from the efficient solution, make economic sense." (1996: 21)

Agreement on Trade-related Investment Measures

1. Investment Measures- Terminology and Concept

The TRIMs Agreement does not define the term "investment measures". However, an Illustrative List of measures that are inconsistent with GATT Article III:4 or Article XI:1 of GATT 1994 is attached to the Agreement.

Under General Agreement on Trade in Services (GATS), the term "measure" means any measure by a Member, whether in

the form of law, regulation, rule, procedure, decision, administrative action, or any other form, (General Agreement on Trade in Services, 1994). The term measure is interpreted similarly in the context of TRIMs Agreement (Panel report, 1998).

The objective of a particular measure is an important factor in determining whether it falls within the disciplines of TRIMs Agreement. Indonesia - Autos is the only case in which the interpretation of the term "investment measures" was provided. In this case, the panel, finding Indonesian measures to be TRIMs, observed that (Panel report, 1998):

> "On the basis of our reading of these measures applied by Indonesia under the 1993 and the 1996 car programmes, which have investment objectives and investment features and which refer to investment programmes, we find that these measures are aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia. Inherent to this objective is that these measures necessarily have a significant impact on investment in these sectors. For this reason, we consider that these measures fall within any reasonable interpretation of the term "investment measures".

The Panel also clarified that there may be other measures which may qualify as investment measures within the meaning of the TRIMs Agreement because they relate to investment in a different manner. Also, the use of the broad term "investment measures" indicates that the TRIMs Agreement is not limited to measures taken specifically in regard to foreign investment.

2. Basic Substantive Obligations

Article 2.1 of the agreement provides that no member shall apply any measure that is inconsistent with the provisions of Article III (national treatment of imported products) or Article XI (prohibition of quantitative restrictions on imports or exports) of GATT 1994. Then, Article 2.2 refers to the Annex which contains an illustrative list of measures that are inconsistent with paragraph 4 of Article III and

paragraph 1 of Article XI. The list contains mandatory measures as well as those which are necessary to obtain an advantage, and which require:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

The Annex further contains examples of such measures. Inconsistent measures include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:

(a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

It is to be noted that the agreement does not bind new obligations to the GATT or pull back anything from it (Panel report, 1997). The agreement spells out that GATT may also cover investment related measures. In disputes concerning TRIMs, the adjudicating bodies follow the principle of judicial economy. If a particular measure is found to be inconsistent with the provisions of GATT articles then there is no need to examine separately the provisions of the TRIMs Agreement (Panel report, 2001).

IV. India—Certain Measures Relating to Solar Cells and Solar Modules

1. Factual Aspects

The dispute was with respect to certain domestic content requirements imposed under the National Solar Mission (NSM). Under this mission, solar developers were required to purchase or use solar cells or solar modules of domestic origin in order to enter into and maintain certain power purchase agreements. The domestic content requirement (DCR) measures were maintained through various instruments under Phase I or Phase II of the NSM. The US claimed that these measures accord less favourable treatment to imported products than to like products of national origin, therefore, inconsistent with Article III: 4 of the GATT 1994. It also claimed that these measures are investment measures related to trade in goods, therefore, inconsistent with Article 2.1 of the TRIMs Agreement.

US requested consultations with India on 6th Feb 2013 and 10th Feb 2014.[5] Consultations were held on 20th March 2013 and 20th March 2014 respectively. The parties were not able to resolve the dispute through consultations. Therefore, US made a request to the Dispute Settlement Body (DSB) to establish a panel.[6] The request for the establishment of a panel was made with standard terms of reference. Panel was established by DSB on 23 May 2014.[7] First substantive meeting with the parties was held on 3 February 2015. But before that, on 29 October 2014, Canada made a request for enhanced third party rights. Canada's request was opposed by both India and United States. Thus, Panel rejected Canada's request for enhanced third party rights.

2. Claims and Findings

2.1 Violation of National Treatment under GATT 1994

The first issue in the case was whether measures falling under paragraph 1(a) of the illustrative list are also inconsistent with the provisions of Article III: 4 of the GATT 1994, thus separate analysis is not required.

In this regard, United States submitted that analysis of either of the two will result in the same conclusion. However, it asserted

that it will be more efficient to analyze the provisions of Article 2.1 of the TRIMs agreement because if a particular measure is found to be inconsistent with Article 2.1 then it is necessarily inconsistent with Article III: 4 of the GATT. India disputed this view and submitted that Article 2.1 of the TRIMs agreement is not a more specific provision, in that it merely clarifies that Article III: 4 of the GATT may cover matters that are related to investment. Accordingly, India contended that elements of Article III: 4 of the GATT must be independently examined. The panel rejected India's contention. The panel relied on the Panel Report in Canada-Renewable Energy/Feed-in Tariff Programme. In that particular case, challenged measures were found to be within the scope of paragraph 1(a) of the illustrative list and separate analysis of Article III: 4 was not done (Panel Report, 2012).

The next issue was whether the DCR measures fall under paragraph 1(a) of the TRIMs Illustrative List. United States argued that the purchase of domestic solar cells and modules was mandatory in order to obtain an advantage, therefore, DCR measures fall under paragraph 1(a). India's arguments on this issue were consistent with its view on the relationship between the TRIMs agreement and the GATT. India did not present any specific arguments in connection with the terms of TRIMs Illustrative List. In the absence of categorical arguments from India's side, the panel decided to examine the evidence and arguments advanced by the United States (Panel Report, 2016).[8]

2.2 Whether the DCR measures are "TRIMs"

United States submitted that the objective of the challenged measures is to encourage the production of solar cells and modules in India; therefore, the measures in question are investment measures. United States supported its argument by citing one of the objectives of the guidelines as being to promote manufacturing in the solar sector, in India. United States also cited the following passage from the Phase II Policy Document:

> "A domestic solar manufacturing base to provide solar components is an important part of India's aspirations to become a major global solar player. The mission aims to establish the country as a solar manufacturing hub, to feed both a growing domestic industry as well as global markets. The solar mission, while leveraging other government policies, looks to provide favourable regulatory and policy conditions to develop domestic manufacturing of low-cost solar technologies, with the support of significant capital investment and technical innovation."

Moreover, India acknowledged that the National Solar Mission seeks to ensure that part of the procurement of solar power is from domestically manufactured cells and modules. In the light of these evidences, the panel found that the DCR measures in question were investment measures within the meaning of the TRIMs Agreement.

2.3 Whether the DCR measures "require the purchase or use by an enterprise of products of domestic origin"

The Panel recalled that the guidelines and request for selection documents dictate to the solar power developers that if they wish to participate in the National Solar Mission then they have to use solar cells and modules manufactured in India. Accordingly, Panel found that the measures in question require the purchase or use by an enterprise of products of domestic origin within the meaning of paragraph 1(a) of the Illustrative List.

2.4 Whether the DCR measures are TRIMs that "are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage" within the meaning of the chapeau of the TRIMs Illustrative List

US submitted that the measures are mandatory because solar power developers had to certify that they will specify their plan for meeting domestic content requirement otherwise earnest money deposit will be forfeited.

As regards advantages, US argued that solar power developers were allowed to bid only if they agreed to purchase solar cells/modules from domestic producers. US also pointed that another advantage was that the government agreed to purchase electricity from solar power developers at assured tariff rates. The Panel accepted this argument. Moreover, India didn't specifically contest

that the contractual benefits and bidding eligibility qualify as advantages. Further, the agreements contained the terms and repercussions of default and/or breach by solar power developers of the above mentioned obligations. Hence, the measures were mandatory or enforceable under domestic law.

Accordingly, the Panel concluded that the measures in question are inconsistent with India's obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 thereby also inconsistent with Article 2.1 of the TRIMs Agreement.

2.5 General Exceptions

Article XX of the GATT 1994 provides an exhaustive list of exceptions which can be invoked by a member to justify any GATT inconsistent measure (Bossche, 2005) The Panel while interpreting the central phase in the first sentence of the provision 'nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures…' stated that the measures satisfying the conditions of Article XX are permitted even if they are inconsistent with other provisions of GATT (Bossche, 2005, p. 599).

For applicability of Article XX it must satisfy the conditions of a two tier test as explained by the Appellate Body in US-Gasoline (Appellate Body Report, 2016):

i. Requirements of one of the exceptions i.e. paragraph (a) to (j).

ii. Chapeau of Article XX i.e. measure is not arbitrary, unjustifiable discrimination between members where similar conditions prevail, and disguised restriction on trade.

In this case, Article XX paragraph (d) and (j) were invoked by India to justify the measure.

In Korea-Various measures on beef case (Appellate Body Report, 2000) requirements for the exception under paragraph (d) were enunciated, which required that:

a) Measure must be to 'secure compliance' with national laws such as customs or IPR which in itself is not GATT inconsistent.

b) Measure must be 'necessary' to ensure compliance.

But, it was stated in Mexico-Texas soft drinks case (Appellate Body Report, 2006) that before going into the intricacies of the above mentioned test, the measure must satisfy the 'Test of Laws or Regulations' which requires that measure must be under:

a) Already existing domestic laws

b) Direct effect of any international law

India failed to show that the measure qualified the 'Test of Laws or Regulations' and thus the arguments and defense with respect to paragraph (d) were not accepted by the DSB.

In this paragraph (j) was interpreted for the first time, specifically the phrase '....essential to the acquisition or distribution of products in general or local short supply....'. It was stated that this phrase was not limited to 'domestic capability of manufacturing' of a member and while dealing with the provision a 'holistic consideration' of all the relevant factors must be considered on a case by case basis (McGivern, 2016).

Conclusion

The decision has been criticized by many, mostly by environmentalists. They have argued that this decision undermined the commitments of the 2015 Paris Climate Summit. However, the decision is consistent and appropriate as far as the WTO jurisprudence is concerned. One must not forget that the whole idea behind the transformation of GATT in 1995 was to bring predictability into the system and greater equality among the members. It is the mandate of the DSB to enforce the covered agreements. If Panels and the Appellate Body will consider commitments under other treaties then the predictability of the system may be compromised. Although law should be dynamic and should change with changing circumstances, but it has to be understood that any change in the WTO obligations can happen only through negotiations and not by destroying the predictability of the system. Until a long term framework on new issues is agreed upon, the WTO Panels and Appellate Body have to interpret as per the existing provisions. Thus, India was directed to discontinue its DCR measures. India needs to reassess its policy and look for measures which are WTO compatible.

However many Indian experts and negotiators expressed their resentment regarding the findings at the 'WTO at 20' conference organized by the Appellate Body of WTO at National Law University, Delhi. They were of the opinion that this case is perfect example of double standards when compared to the much celebrated US—Shrimps case and many others. Additionally, it shows that developing countries have not received the benefits they were promised regarding the policy space relating to domestic content requirement at the Doha round of WTO Inter-ministerial conference.

Notes

[1] Agenda 21. International Cooperation to Accelerate Sustainable Development in Developing Countries and Related Domestic Policies. Ch. 2, para 2.5.

[2] Section 609 of US Public Law 101–162

[3] Malaysia, Pakistan and Thailand

[4] Chapeau refers to the head of Article XX of GATT

[5] WTO document WT/DS456/1 and WT/DS456/1/Add.1.

[6] WTO document WT/DS456/5.

[7] WTO document WT/DSB/M/345.

[8] "Based on the requirements of the TRIMs Illustrative List, we examine the United States' claim based on: (a) whether the DCR measures are "TRIMs" within the meaning of Article 1 of the TRIMs Agreement; (b) whether the DCR measures "require the purchase or use of products by an enterprise of products of domestic origin" within the meaning of paragraph 1(a) of the Illustrative List; and (c) whether the DCR measures are TRIMs that "are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage" within the meaning of the chapeau of the Illustrative List." Panel Report, India - Certain Measures Relating to Solar Cells and Solar Modules, Para.7.57.

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