

INDIA v U.S. - WTO SOLAR RULING AND INDIAN ENVIRONMENTAL GOVERNANCE

Written by *Stuti Khare*

4th year B.A.LL.B. Student, Institute of Law, Nirma University, Ahmedabad

INTRODUCTION

Development versus environment is not a new concept, but a debate which has been going on from decades. Recent years have seen environmental protection developing into a moral issue which led nations and international organisations to take steps toward it. One such step was the Jawaharlal Nehru Solar Mission launched by former Prime Minister Dr. Manmohan Singh in 2010. It was a step that India took to move toward using cleaner fuels, solar power in this case. This was and still is a prospective project for India as the raw material needed here- sunlight is something that India has in abundance as it is “*blessed with approximately 300 sunny days in a year and solar insolation of 4-7 kWh per Sq. m per day.*”¹ The phase one of the project started in 2010 and was over by start of 2013 when the 2nd phase was supposed to begin but before this could happen a trade dispute was filed by U.S. against India in July of 2013 claiming that India is violating international trade rules through the project.

The article first describes the project and the reason behind the dispute at WTO and India’s defence, then it tries to analyse the judgement given by the WTO panel, the role U.S. played in it and how even after India agreed to comply it continues to create hurdles for further movement of the project. The article gives arguments supporting WTO’s verdict but shows how U.S. is trying hard to take an unfair advantage out of the situation.

¹ Available at <http://mnre.gov.in/sec/solar-assmnt.htm>

JAWAHARLAL NEHRU SOLAR MISSION

A large chunk of India's population is still primarily residing in the rural areas of the country, even the economy is heavily depended on agriculture produce not just for direct consumption but also with respect to raw materials for many industries. Thus solar energy is the answer to the needs of today's developing India. A lot of these areas face poor electricity connection and thus an improvement in supply of electricity will ensure many things for rural Indians- it ensures a better quality of life which can be brought in by reduction in poverty and in improvement of education system. Improved electricity will also ensure better health services in the area. Obviously electricity does not builds hospitals and schools but it supports the basic infrastructure required to build and run these institutions efficiently. And thus Jawaharlal Nehru National Solar Mission was and still is an important project as electricity is the vital part of it

The aim of the project was to bring up India's solar power capacity up to the range of 100 GW by the year 2022. *“For this purpose the government has planned to enter into long term agreement for purchase with various producers of Solar Power also guaranteeing the sale of the energy which will be produced and price which it will obtain.”*²

*If this energy is harnessed efficiently, it can easily reduce our energy deficit scenario and that to with no carbon emission. Many States in India have already recognised and identified solar energy potential and other are lined up to meet their growing energy needs with clean and everlasting solar energy. In near future Solar energy will have a huge role to play in meeting India's energy demand.*³”

The whole project was divided into 2 phases. Before the complaint could be filed by the U.S the Phase-1 of the project was already complete with some positive results. It was a success story which brought encouraging response from the various developers of solar project. The phase-1 worked on discounts offered on CERC approved tariffs which were offered by the

² Jawaharlal Nehru National Solar Mission, <http://mnre.gov.in/file-manager/UserFiles/draft-jnnsmpd-2.pdf>

³ *Ibid*

project developers. This helped in transparency in selection and a reduction in cost due to the competition.

This phase of the national solar mission was separated in to two batches- batch 1 and batch 2. Batch 1 brought a capacity addition of 500 MW and 150 MW of grid connected to solar thermal plants and solar PV plants respectively. Batch 2 of the project envisaged 350 MW capacity production through solar PV plants.

There were various grid connected solar power project working prior to the launch of the project which were working at various stages of development. To incorporate all these project under the JNNS Mission a migration scheme was launched in February of 2010. It provided an option to these projects to move from their existing prearrangements to the arrangements under the JNNS Mission but with the consent of their respective state governments, the distribution licensee and also the willingness of its developers. This resulted in 84 MW (54 MW of solar PV plants and 30 MW of solar thermal plants) worth of solar project being migrated to the JNNS Mission.

Apart from these large projects with the grid connected to large plants, there were also smaller projects in the Mission. The projects had 2 subparts called the Roof top PV and the Small Solar power Generation Programme in which roof top panels with a capacity of less than 2 MW were also brought in the mission.

With the capacity generation of the first phase and its success a lot was envisaged by the second phase of the project making it one of the most important missions as its success could have made India leader in the Solar Energy but it was hampered by the Trade dispute filed by U.S. in 2013 as discussed in the next section.

ORIGIN OF DISPUTE

In 2013, project saw the first set back. USA filed a complaint against India to WTO claiming that the policies of India in the project were in violation of Global Trading Rules. It claimed that India has violated the “national treatment” policy as it was discriminating indigenously

produced goods and imported goods. Here the goods were Solar cells, modules and other related products. As mentioned above government entered into long term agreements with producers of solar power and guaranteed them the price which the energy produced will obtain. But for availing this treat it has also imposed a condition- the producers are required to use only domestically produced solar cells and modules, only then the government will guarantee purchase of the energy produced.

To justify it stand when the complaint was filed India brought forward the justification of 'government procurement' which permits a country to deviate from the national treatment obligation if they could show that the step they took was for the "*procurement by governmental agencies of products purchased for governmental purposes and not with a view to use them commercially by either using in production of commercial goods or reselling it itself.*"⁴

In the trial India framed its argument taking the GATT article XX(d) and argued that under the article it had "*an obligation to take steps to achieve energy security, mitigate climate change, and achieve sustainable development, and that this includes steps to ensure the adequate supply of clean electricity, generated form solar power, at reasonable prices.*"⁵

As there were already unofficial rumours that the ruling of WTO could be against India, thus it tried to held talks with the US and go for an alternative dispute settlement which failed.⁶

The arguments were rejected by the WTO panel and were labelled as baseless. India still had the option for appeal which it exercised but apart from that it itself raised a trade dispute against U.S. in the same forum with the same complaint. India claimed that even U.S. is violating these rules as in states of California (the self-generation incentive program and Los Angeles Department of Water and Power's Solar Incentive Program), Connecticut, Delaware (Delaware Solar Renewable Energy Credits), Massachusetts, Minnesota (Made in Minnesota Solar Incentive Program), Montana (Montana tax incentive for Ethanol Production) and Washington

⁴ Jay Sanklecha, Why the WTO is right in solar panel dispute, The Hindu, 3 March, 2016, Available at <http://www.thehindu.com/opinion/columns/why-the-wto-is-right-in-the-solar-panel-dispute/article8305405.ece>

⁵ D. Ravi Kant, India's appeal against WTO solar ruling rejected, Livemint, 16 September 2016, Available at <http://www.livemint.com/Industry/dPX7vDr1SaGmzoT2X1wDPI/Indias-appeal-against-WTO-solar-ruling-rejected.html>

⁶ U.S., India in talks to settle solar power trade dispute, The Hindu, 07 February, 2016, Available at <http://www.thehindu.com/business/Industry/us-india-in-talks-to-settle-solar-power-trade-dispute/article8203747.ece>

(renewable energy cost recovery incentive payment program) the domestic content requirement and subsidies violate core global trade rules⁷. Even though such dispute has been filed but new Delhi's failure in launching this complaint at the required time has robbed India of the chance to use it to get an edge over the situation that it would have got had the complaint was filed earlier when the dispute was started and before the ruling of WTO panel came out. As a result even the appellate body of WTO gave the same decision and held India guilty of violating Global trade rules.

Though a lot of environmentalist criticized this action of WTO but the pressure on India was enough to back off in its policies which were violating the trade. Apart from the people criticizing there were an equal number of people who supported WTO's action. The reason behind their side was careful analysis of the objective behind the WTO rule.

ANALYSIS OF THE JUDGEMENT BY WTO

The logic behind such global trade rules which discourages countries to favour locally produced goods is to remove the system of local subsidy for a more competitive and globalised market.

Many people argued that the measure taken by WTO were not right as it discouraged use of cleaner fuels and also such rules would harm India's economy where government subsidy is a common concept but if the Global trade rules and the decision of WTO is seen keeping a long term consequences in view these may seem to be right. The Decision of WTO can be analysed on 3 parameters- Legal issue, environmental impact and India U.S. trade relations⁸.

Legal Issue

The rules of the WTO treaty not just prohibits favouring nationally produced goods but it disallows discrimination of goods and products based on their origin and destination itself. This commitment of non- discrimination by countries in ensured through various legal provisions

⁷ *Supra* 4

⁸ Prabhas Ranjan, A case for accepting WTO Ruling, The Hindu, 28 September 2016, Available at <http://www.thehindu.com/todays-paper/tp-opinion/A-case-for-accepting-the-WTO-ruling/article15003724.ece>

like the one in Solar Trade rules which U.S. claimed that India was violating by promoting solar cells of domestic origin, making them necessary for availing benefits under the scheme of Jawaharlal Nehru National Solar Mission.

India in its defence raised the argument that these DCR measure should not be applied on India as it falls under three exceptions-

- The first is the exception under Article III-8 of the General Agreement on Tariffs and Trade (GATT) that makes the rule of prohibition on DCR inapplicable on the procurements of government.
- The second was under XX-j of GATT which allows any country to take such measures which are 'essential' for the acquisition and/or distribution of the goods and products which are in short supply generally or locally. India raised the concern that since the production of solar modules domestically is very limited such products have a 'short supply'
- The third argument was raised under Article XX-d of GATT which allows a country to adopt such measures which seem 'necessary for secure compliance of law and regulations which are in harmony with GATT.

All these arguments of India were disparaged by WTO through various legal point. On its first argument with respect to the Article III-8 WTO relied on its previous jurisprudence which it applied in – 'the renewable energy, Canada- Feed in Tariff Programme case. There it was held that for any product to fall under Article III-8, it must have a competitive relationship with the product which is being discriminated against. This was a negative point for India as here government was procuring electricity whereas the product which was being discriminated through the policies was solar panel and thus such competitive relationship could not be established in the panel or appellate body.

With respect to the second argument regarding Article XX-j it was held by the appellate body that to determine that whether a product is in short supply or not there is a need to look at its supply from all the sourced available and not just domestic sources. Taking this view it could not be said that there was shortage of supply in solar panels especially when you have neighbours like China.

The third argument was with respect to Article XX-d of GATT. This argument also backfired and India was not successful in showing any law or legal norm whether domestic or international applicable in India the compliance if which would require DCR.

Environmental Impact

As discussed above that many people including some major environmentalist claimed that the ruling of WTO stifles India's labour to move toward the use of cleaner fuels and it also shows WTO deviating toward free trade rather than environment. But if we look at these arguments deeply we realise none of them have a strong base.

First, about hampering India's efforts the WTO has given a ruling against DCR and not the whole project of JNNS Mission and that too after considerable delay to give India and U.S. enough time to negotiate and have an out of court settlement (which failed miserably). So now the government can continue with its efforts toward cleaner fuels if no further cases are raised by U.S. by giving the choice of either buying the solar modules and cells from domestic market or by importing them from outside.

Coming to the second argument that this shows a bias of WTO toward free trade rather than environment protection and sustainable development. But if we look at Article XX of GATT it recognises the sovereign right of a country to make regulation not only with respect to achieve environmental objects but also for attaining health goals public moral and others. This shows that WTO believed in sustainable development and creating a harmony between trade and environment. Thus the treaty of WTO gives limited policy choices to its members to achieve these objectives and goals as mentioned in Article XX. The essential norm it wants to set is that the extra or unfair expenses of achieving these goals by one nation must not be transferred unilaterally or otherwise to the other WTO member nations⁹. Thus in a situation where numerous choices are available to achieve an objective (environmental, health or any other) the WTO encourages the one which has the least trade restrictions and one is also reasonably available must be chosen by the nation. Thus there are laws which make sure that to pursue an

⁹*Pradeep S. Mehta and Smriti Bahey*, India's Solar Panel Dispute: A Need To Look Within, *The Wire*, 15 March 2016, Available at <https://thewire.in/24787/indias-solar-panel-dispute-a-need-to-look-within/>

environmental objective a country does not adopt such measures that are leads to arbitrariness, unjust discrimination or causes any veiled trade restriction.

India- U.S. Relations

Though many speculate negatively about the economic future of America, it cannot be denied it still is and will be for at least the coming decade's one of the super power which will be dominating the global market thus India has to make sure that it maintains amicable trade ties with the nation. Since India enacted these domestic content requirements in 2011, its solar exports to India have fallen by over 90% which obviously goes against such amicable relation¹⁰

If we look at the current scenario the trade between India and U.S. stands annually at over \$100 billion¹¹. In the joint statement given by both the states in June of 2016 they aspire to bring up this figure to \$500 billion annually by removing barriers to the movement of trade goods and services. But the solar panel trade dispute between both the countries portray a contrasting image to this aim as new barriers are erected instead of the old one being removed. Apart from the solar panel case there are other trade dispute cases going on as well in WTO between both the countries which will be affected negatively or positively on the basis of the outcome of solar panel case.

Many experts are of the view that the WTO ruling against India is a lesson that we should not chase for such nationalist measures which are already outlawed by the WTO under the garb of moving towards cleaner energy. If India fails to comply with these norms not only U.S. will be free to raise its own trade restrictions in other areas as well but it will also have to face sanction by WTO.

This is not the only reason why compliance is in India's interest. It must be realised that without looking at the fact that it incurs more cost, the mandatory sourcing of domestic solar panels will ultimately result in generation of solar energy becoming unfeasible causing the downfall of the whole mission.

¹⁰ Kirtika Suneja, India loses WTO appeal in Solar dispute, *The Economic Times*, 16 September 2016, Available at <https://economictimes.indiatimes.com/industry/energy/power/india-loses-wto-appeal-in-us-solar-dispute/articles>

¹¹ Available at <https://www.census.gov/foreign-trade/balance/c5330.html>

Also the alternative of DCR as suggested by the Ministry of New and Renewable Energy which are subsidies to safeguard solar manufacturing must not be chosen as they are already prohibited by the WTO. Choosing them in place of DCR can create more problems in face of newer WTO cases against India.

UNFAIR ADVANTAGE BY U.S.A.

Recent years have seen that Renewable energy is becoming a hot topic of friction in trade between some of the major economies of the world as they compete with each other to dominate this sector as it is expected to see a boom in a future due to the decreasing supply of coal and oil which may eventually be extinguished.

Analysts of this sector claim that the main reason behind the trade dispute between India and U.S. may not be DCR but it is only an excuse as India is becoming an attraction for big global power players as it is a lucrative market for production and use of solar energy.

Chief Executive of Vikram Solar- Gyanesh Chaudhary said that “to improve its solar scene India must compete with nations like Japan, China and USA who not only have their own highly efficient and tested supply chain of Solar goods produce but they also get backing from their respective governments through supporting legislations both financially and otherwise. So even though there is an improvement¹² in manufacturing capacity of the India module yet the aim of acquiring a significant portion of the global market is still far. He further claimed that even now the imported modules are about 8-10% cheaper than those produced domestically.

All this clearly shows that India’s development as a Solar Power leader can create a lot of trade difficulties for U.S. thus its step towards stopping India from becoming one is not far-fetched argument or impossible to accept. This can also be seen by the reaction of U.S. after the ruling was given

¹² V. Rishi Kumar, Resolve Policy issues: Vikram Solar CEO to Centre, The Hindu Business Line, 17 January 2018, Available at <http://www.thehindubusinessline.com/info-tech/resolve-policy-issues-vikram-solar-ceo-to-centre/article10038061.ece>

After the ruling India in its official statement made it clear to WTO and the world that it would comply with WTO prospectively for justice but it also made it clear that it will not scrap now the tenders which were awarded before the appeal was rejected by WTO panel in September of 2016. Thus there would be no change in working of solar project with a generation capacity of 3000 MW for which official agreements with states were signed¹³.

Later it claimed that it has stopped the issuance of tenders with the condition of DCR- Domestic Content Requirement and if the project officials are to be believed it affected 500 MW of the project which were still in the pipelines when the ruling came out.

Now India has made clear that it will use such measures which are in sync with WTO regulations or at least insulated from its purview to promote domestic Solar Industries.¹⁴ For this the ministry of New and Renewable Energy has come up with a plan where the government would act as an owner of the project instead of just being the developer. This way it will be free to choose the solar modules which are produced domestically. Thus it can be predicted that the scheme which was proposed regarding set up of Solar projects with power of 1000 MW and 300 MW respectively by central Public Sectors and Defence establishments would be using locally produced Solar cells and modules.

Just after the WTO ruling India came into an agreement with WTO that it will comply with the ruling until 14th December 2017 and it informed WTO'S dispute settlement bodies (DSB) that it has successfully done so.

India issued a statement to DSB where it claimed that the authorities have had an extensive internal consultation with the stakeholders after the WTO ruling and other recommendations given by DSB so that it could completely comply with them and thus it has also stopped to impose any such conditions which could be found to be inconsistent with WTO norms or DSB's recommendations.

¹³ Banikinkar Pattanayak, India and U.S. in WTO faceoff over solar power ruling compliance, Financial Express, 22 March 2017, Available at <http://www.financialexpress.com/india-news/india-and-us-in-wto-face-off-over-solar-power-ruling-compliance/597533/>

¹⁴ *Ibid*

But even after these steps taken by India and making them open it has been unfortunate that in the next DSB meeting which was held on 12 January of this year U.S. once again be raised a dispute claiming failure of India in complying with the WTO trade ruling.¹⁵ This could result in fresh round of case and its litigation against India in WTO. Washington hopes that India is found not to be complying with the WTO norms so that it could encourage WTO to impose certain trade restrictions on India. Even though the case is not proved even initiation of a case would mean years dragging and hamper in the JNNSM as the system of WTO is still struggling to complete off a large number of highly complicated trade disputes thus the case could go on for a few years.

As a response of such loud and clear claims, India issued a statement in WTO and said that India has not only changed the rules and thus any claims by U.S. of non-compliance are baseless¹⁶.

India also claimed that U.S. has not only skipped legal steps but has also failed to follow the procedures of WTO by omitting to mention the specific level trade sanctions which it could impose on India, leaving it in a prejudiced state. India also claimed that if the proper procedures would have been followed India would be vindicated.¹⁷

India in a move to protect its domestic industry not only from U.S. rivals but also from global competition also informed WTO that it would be considering its rights to impose an emergency tariff on solar panel, solar cells and modules temporarily as response to a petition given by the domestic Industry. These safeguard temporary tariffs are actually allowed by the WTO if the nation is able to show that there is serious harm or at least threat of serious harm on the production of any good produced there due to an unforeseen and sudden gush of imports. To

¹⁵ U.S. plans to raise again in WTO solar power issue with India, *The Hindu*, 20 December 2017, Available at <http://www.thehindu.com/business/us-takes-india-back-to-wto-in-solar-power-dispute/article22059123.ece>

¹⁶ D. Ravi Kanth, WTO: India-US dispute over solar cells, modules intensifies, *Livemint*, 10 January 2018, Available at <http://www.livemint.com/Politics/UNRFSuIcJ4KYvUBWfu59wL/WTO-IndiaUS-dispute-over-solar-cells-modules-intensifies.html>

¹⁷ India rejects U.S. solar claim at WTO, explores new defence, *The Hindu*, 9 January 2018, Available at <http://www.thehindu.com/business/Industry/india-rejects-us-solar-claim-at-wto-explores-new-defence/article22401806.ece>

prove this India produced evidences showing that there has been an increase in the market share of imports from 86% in 2014-15 to 90% in 2017-18 which has caused huge and still growing losses for Local producers and a steep rise in the inventory¹⁸. Further to encourage improvement in production the government has decided to sanction a VGF- viability gap funding of about RS 5,050 crores with the aim to set up over 5000 MW of solar power projects linked to grid under the Jawaharlal Nehru National Solar Mission.¹⁹

Further to ensure that U.S. is not able to raise further question India has sought to establish a Compliance panel which will have the primary duty of examining the matter and to sort out all the difference in opinions. For this purpose India has also requested for a special meeting to be arranged on 9 February in WTO'S dispute settlement body so that this matter could be further discussed. What happens in the meeting remains to be seen but it is likely that a quick positive response should not be expected²⁰.

CONCLUSION

By looking at the above content it would not be wrong to say that even though India was initially wrong with respect to its policies the arguments for which are three fold- legal issue, environmental impact and trade relations, but even after complying with the ruling given by WTO and the recommendations proposed by its dispute settlement body U.S. is still trying to hamper its path toward use of cleaner fuel for sustainable development and ecological balance. Looking at the support that India is getting internationally²¹ it cannot be denied that the demand by U.S. are unjustified. Also even though U.S.A is raising allegations at India there are reasons

¹⁸ *Ibid*

¹⁹ Solar Project gets Rs 5050 crores from the centre, The Hindu, 20 January, 2016, Available at <http://www.thehindu.com/news/national/Solar-projects-get-Rs-5050-crore-boost-from-Centre/article14010146.ece>

²⁰ India-US Solar Dispute: WTO ruling likely to be delayed, The Hindu Business Line, 19 January 2018, Available at <http://www.thehindubusinessline.com/news/world/indiaus-solar-dispute-wto-ruling-likely-to-be-delayed/article8248415.ece>

²¹ D. Ravi Kanth, WTO: Support grows for India in solar tiff with US, Livemint, 10 January 2018, Available at <http://www.livemint.com/Politics/mSx6CQUqgyY6Y3h4N0bDXM/WTO-Support-grows-for-India-in-solar-tiff-with-US.html>

to suspect it of complying with similar laws promoting domestically produced goods for solar power in its various states which shows the hypocrisy of the most developed nation and how it prevents a developing country to choose sustainable development and become leader in Solar Energy. Maybe this is the biggest fear of U.S. as with a forced reduction in reliance on coal and natural gas as a fuel due to its availability, solar energy seems like a bright option of tomorrow and letting a state becoming the global leader in it would rob U.S. of its economic power. Thus it would not be wrong to say that free trade and sustainable development are only used as tools to fulfil other agendas in disguise.

