26 February 2016

WTO Panel Report : India – Solar Cells and Modules

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Summary

Decision: A WTO Panel has ruled that local content requirements maintained by India for solar cells and modules violate India's national treatment obligations under the General Agreement on Tariffs and Trade (GATT) 1994 and the WTO Agreement on Trade-Related Investment Measures (TRIMs).

Significance of decision

This decision marks the first time that a WTO Member has sought to justify a WTO violation by pointing to its international obligations on climate change. This argument was rejected by the WTO Panel.

India invoked the United Nations Framework Convention on Climate Change (UNFCCC) as part of its defence under the exception provided for in GATT Article XX(d). GATT Article XX(d) allows WTO Members to maintain measures "necessary to secure compliance" with GATT-consistent "laws or regulations". Among other things, India pointed its international legal obligations, including the UNFCCC. India also argued that it argued that 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 from solar power, at reasonable prices".

The UNFCCC argument foundered on the definition of what constituted "laws or regulations" under the exception provided in Article XX(d). Drawing on prior Appellate Body precedent, the Panel found that the term "laws or regulations" applied only to domestic laws, not international treaties. It also pointed to the Appellate Body's statement that international agreements could only be considered to constitute "laws or regulations" if they had been "incorporated, or have 'direct effect', within a Member's domestic legal system". The Panel found that international treaties did not have direct effect in India and so dismissed the Article XX(d) defence.

Even if international agreements did have direct effect in India, this defence would nevertheless have likely failed, as it would be very difficult to establish that local content requirements are "necessary to secure compliance" with the UNFCCC. The UNFCCC imposes relatively few hard commitments, particularly on developing countries. Indeed, the UNFCCC provisions cited by India in its Article XX(d) defence commit all Parties to formulate "national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing …emissions" of greenhouse gases, and "measures to facilitate adequate adaptation to climate change", and to "[t]ake climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions…." It would be virtually impossible to establish that local content requirements are necessary to "secure compliance" with such general provisions.

This case is also the first time that a WTO Member has invoked GATT Article XX(j) as a defence, a provision that could allow measures "essential to the acquisition or distribution of products in general or local short supply".

Article XX(j), as the Panel noted, was "originally intended to remain in force only for a specified three-year transitional period to deal with shortages that existed following World War II". Although the provision was retained in the GATT, it was virtually a dead letter until invoked by India in the present dispute.

The Panel rejected India's argument that "solar cells and modules are 'products in general or local short supply' in India on account of its lack of domestic manufacturing capacity". India acknowledged that the quantity of solar cells and modules available from all sources, both imported and domestic, was sufficient to meet the demand of Indian solar power developers. The Panel found that the provision did not refer to "products in respect of which there merely is a lack of domestic manufacturing capacity".

Thus, Article XX(j) – awoken from its decades-long slumber – has been interpreted in an appropriately narrow way, and seems doubtful that it will be invoked in future disputes. It is likely that this provision will return to its prior state of dormancy in the GATT.

Report

Factual Background: India's National Solar Mission and the local content requirements

This dispute arose from certain local content requirements imposed by India under the Jawaharlal Nehru National Solar Mission, which was established by the Indian government in 2010. The objective of the National Solar Mission is to "establish India as a global leader in solar energy, by creating the policy conditions for its diffusion across the country as quickly as possible". It also seeks to make a "major contribution by India to the global effort to meet the challenges of climate change".

In order to promote solar power capacity, the Indian government enters into long-term power purchase agreements with solar power developers, providing a guaranteed rate for a 25-year term. The power developers are in turn subject to mandatory domestic content requirements, obligating them to use certain Indian-manufactured cells and modules.

National treatment: violations of the GATT and the TRIMs Agreement

The United States argued that the local content requirements violated India's national treatment obligations under GATT Article III and the TRIMs Agreement.

GATT Article III:4 provides in part that imported products must 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."

Article 2 of the TRIMs Agreement provides that "no Member shall apply any TRIM that is inconsistent with the provisions of Article III… of GATT 1994". The TRIMs Agreement sets out an "illustrative list" of TRIMs considered to be inconsistent with GATT Article III:4, including "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 require…the purchase or use by an enterprise of products of domestic origin or from any domestic source…."

The Panel first determined that India's domestic content requirements for solar cells and modules should be considered as trade-related investment measures. It agreed with the rulings of earlier panels that "if [the] measures are local content requirements, they would necessarily be 'trade-related' because such requirements, by definition, always favour the use of domestic products over imported products, and therefore affect trade". It then found that the Indian measure required "the purchase or use by an enterprise of products of domestic origin or from any domestic source" within the meaning of the TRIMs Agreement. These provisions were also "mandatory or enforceable" under Indian law.

Therefore the Panel found that these local content requirements violated India's obligations under both the TRIMs Agreement and GATT Article III:4.

"Government procurement carve-out" inapplicable

India sought to justify its solar local content requirements by recourse to the so-called "government procurement carve-out" under GATT Article III:8(a). This provision states that the national treatment disciplines of GATT Article III "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."

In the 2013 case of *Canada – Renewable Energy/Feed-In Tariff Program*, Canada unsuccessfully invoked this provision to seek to justify a similar measure maintained by Ontario. The Appellate Body rejected Canada's defence, finding that "the product being procured is electricity, whereas the product discriminated against for reason of its origin is generation equipment". The Appellate Body concluded that "[t]hese two products are not in a competitive relationship", and therefore Article III:8(a) did not apply.

Citing this precedent, the United States argued in the current case that "the product procured (electricity) is not in a competitive relationship with the product being discriminated against (solar cells and modules), and… such discrimination is therefore not covered by the derogation of Article III:8(a)". The Panel agreed, finding that the challenged Indian measures were not "distinguishable in any relevant respect" from the Canadian provisions examined earlier by the Appellate Body. Therefore, the Panel concluded that the Indian local content requirements for solar cells and modules were "not covered by the derogation of Article III:8(a)".

India's overarching arguments on energy security and climate change

India argued that its local content requirements could nevertheless be upheld under the exceptions provided for in GATT Article XX(j) and XX(d). Before turning to the specifics of those provisions, India advanced a "general underlying argument" that applied to both. It argued that 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 from solar power, at reasonable prices". India asserted that this would "reduce its reliance on imported oil and coal". More specifically, India argued that it was "necessary to ensure that there is an adequate reserve of domestic manufacturing capacity for solar cells and modules in case there is a disruption in supply of foreign solar cells and modules".

GATT Article XX(j): Panel rejects India's defence on products in "short supply"

India then invoked the exception of Article XX(j), arguing that "solar cells and modules are 'products in general or local short supply' in India on account of its lack of domestic manufacturing capacity". It added that "the risk of [solar power developers] being unable to access these products makes them 'products in general or local short supply' in India" [original emphasis].

The Panel began its analysis of this issue by noting that it would proceed on the understanding that solar cells and modules were the products claimed to be in "general or local short supply". It also remarked that "the general exception contained in Article XX(j) has never been invoked as a defence before a GATT/WTO dispute settlement panel".

The Panel interpreted the term "products in general or local short supply" to refer to "a situation in which the quantity of available supply of a product does not meet demand in the relevant geographical area or market". It observed that "the words 'products in general or local short supply' do not refer to 'products *of national origin* in general or local short supply'" [original emphasis]. The Panel considered that "the effect of adopting India's interpretation of Article XX(j) would be tantamount to interpreting the words 'products in general or local short supply', in the first part of Article XX(j), as though they meant 'products in general or local short *production*'" [original emphasis]. The Panel rejected such an interpretation.

The Panel thus concluded that the term "products in general or local short supply" did not refer to "products in respect of which there merely is a lack of domestic manufacturing capacity". It added that "India has not argued that the quantity of solar cells and modules available from all sources, i.e. both international and domestic, is inadequate to meet the demand" of Indian solar power developers.

It also ruled that "the terms 'products in general or local short supply' do not cover products at risk of becoming in short supply" [original emphasis]. It added that "even assuming for the sake of argument" that the term could be interpreted to include products at risk of being in short supply, the Panel considered that "only imminent risks of such shortage would be covered".

For these reasons, the Panel ruled that "solar cells and modules are not 'products in general or local short supply' in India". It found that the local content requirements could therefore not be justified under GATT Article XX(j).

GATT Article XX(d): Panel rejects India's defence on "securing compliance" with international and domestic laws

The Panel began its analysis on the Article XX(d) defence by noting that it was now "well established" in the jurisprudence that this exception "contains two cumulative requirements: first, it must be shown that the challenged measure is 'designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994'; second, it must be shown that the measure is 'necessary' to secure such compliance".

India argued that its local content requirements for solar cells and modules were justified under Article XX(d) because they were "integral to its compliance with both domestic and international law obligations to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change".

India first pointed to its "international law obligations … embodied in various international instruments", i.e., "(a) the preamble of the WTO Agreement; (b) the United Nations Framework Convention on Climate Change; (c) the Rio Declaration on Environment and Development; and (d) the United Nations General Assembly Resolution adopting the Rio+20 Document: The Future We Want, adopted by the United Nations General Assembly in 2012".

The Panel did not consider such instruments to be "law and regulations" within the meaning of GATT Article XX(d). The Panel referred to the 2006 ruling of the Appellate Body in *Mexico – Taxes on Soft Drinks*, which interpreted the term "laws or regulations" to refer to "rules that form part of the domestic legal system of a WTO Member" as well as "rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system". In the current case, the Panel found that "India has failed to meet its burden of demonstrating that any of the international instruments at issue have 'direct effect' in India". Accordingly, the international instruments cited by India could not be "considered 'laws or regulations' within the meaning of Article XX(d).

The domestic laws cited by India similarly failed to meet the requirements of Article XX(d). The Panel found that the term "laws or regulations" referred to "legally enforceable rules of conduct under the domestic legal system of the WTO Member concerned, and do not include general objectives". The Panel found that most of the domestic instruments cited by India were not "legally enforceable, either as against the Government or any other entity". Instead, they set out broad policy objectives.

The Panel found one instrument, a provision in India's Electricity Act, to be a "law or regulation" within the meaning of Article XX(d), but it considered that India failed to demonstrate that the local content requirements were measures "to secure compliance" with it. It dismissed India's defence under Article XX(d).

Therefore, the Panel confirmed that India's local content requirements for solar cells and modules violated India's national treatment obligations under the GATT and the TRIMs Agreement, and were not justified under GATT Article XX(j) or (d).

Note from Brendan McGivern, head of the World Trade Organization (WTO) practice of the White & Case LLP and Executive Partner of the Firm's Geneva office.

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