INDIA'S WTO WOES: A CONCERN FOR THE DEVELOPING WORLD AT LARGE

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ABSTRACT

The Jawaharlal Nehru National Solar Mission aimed at reducing the cost of solar power generation in India and increasing India's solar capacity. India imposed a Domestic Content Requirement with respect to solar cells and modules used in the projects. The project aimed at establishing India as a global leader in solar energy, by creating the policy conditions for its diffusion across the country. In 2013, the United States of America brought a claim before the WTO challenging the DCR's on the ground that the same violated Article III:4 of the GATT, 1994 and Article 2.1 of the TRIM's Agreement. The WTO panel consisting of Chairperson Mr. David Walker held that the Domestic Content Requirement measures were inconsistent with the Articles of the GATT and TRIM's Agreement. This decision will have severe ramifications on the developing world trying to build up renewable energy sector. WTO's interpretation of the Articles used by India as defences from GATT, 1994 have laid an unhealthy precedent by not taking massive environmental concerns of the developing countries. This decision enumerates the North-South divide and also the WTO's inability to act on dire issues relating to mutual inclusiveness of trade and environmental laws.

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I. INTRODUCTION: FACTUAL BACKGROUND

The Jawaharlal Nehru National Solar Mission (hereinafter referred to as '**JNNSM**') was launched by India in 2010 with the objective of reducing the cost of solar power generation in India and increasing India's solar capacity to 100 GW.[1]It was observed that countries including the United States of America (hereinafter referred to as '**USA**') were exporting Solar Cells, Modules and Panels as well as Thin Films at a price that was below their normal value, thus resulting in dumping of the said goods in India. Thus, the Director General of Antidumping & Allied Duties, under the auspices of the Ministry of Trade and Commerce, recommended theimposition of definitive anti-dumping duties ranging from US$ 0.11 per watt to US$ 0.81 per watt on the imports of the aforementioned goods.[2]However, ultimately, the Ministry of New and Renewable Energy (hereinafter referred to as '**MNRE**'), in its wisdom, chose to impose a Domestic Content Requirement (hereinafter referred to as '**DCR**') instead of an Anti-Dumping Duty. DCR essentially requires a particular project to make use of solar panels and solar cells made in India, i.e. manufactured domestically.

Out of 28 Power Purchase Agreements (PPAs) in Phase I (Batch I) of the National Solar Mission, 14 made use of foreign cells or modules whereas the remaining 14 used Indian cells or modules. In the second batch of Phase I, only 8 out of 27 PPAs made use of Indian cells or modules while all 22 PPAs in Batch I-A of Phase II used Indian cells and modules. As such, a DCR was imposed in 44 out of a total of 77 PPAs in Phase I (Batch I), Phase I (Batch II) and Phase II (Batch I-A) of the National Solar Mission.[3]

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

2 Anti-Dumping Duty on Imported Solar Modules, Government of India: Ministry of Commerce & Industry, August 6th, 2014, http://pib.nic.in/newsite/PrintRelease.aspx?relid=108131

3 Chakrabarti, R. et.al., *India: Solar Panels Domestic Content Requirement and the WTO*, Mondaq News, June 15th,2016,http://www.mondaq.com/india/x/500508/Renewables/Solar+Power+In+India+Solar+Panels+Domestic+Content+Requirement+And+The+WTO

II. COMPLAINT BY THE UNITED STATES: FACTUAL ASPECTS

On February 3, 2013[4] and February 10, 2014[5], USA sought consultations with India with reference to the DCR imposed under Phase I and Phase II of the National Solar Mission.[6] Consultations, in response to the aforesaid requests were held on 20 March, 2013 and 20 March, 2014 respectively. Subsequently, pursuant to Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), on 14 April 2014, USA requested the establishment of a panel, which was established on 23 May, 2014 and held its first substantive meeting from 3rd to 4th February, 2015.

A. CONTENTIONS OF THE PARTIES AND ARGUMENTS CONCERNING THE DCR MEASURES

The United States' contended that India's DCR resulted in a violation of Article III:4 of the General Agreement on Tariffs and Trade (hereinafter referred to as '**GATT**'), 1994 and Article 2.1 of the Agreement on Trade-Related Investment Measures (hereinafter referred to as '**TRIM's**').[7]

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4 The United States' first request for consultations was made pursuant to Articles 4, 7 and 30 of the Agreement on Subsidies and Countervailing Measures with respect to potential inconsistencies with that agreement. *India- Certain Measures Relating to Solar Cells and Solar Modules: Request for consultation by the United States*,February 6th, 2013, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=114769&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

5 The United States' second request for consultations was not made pursuant to the SCM Agreement, nor did the United States' request for the establishment of a panel to make reference to any of the provisions of the SCM Agreement. *India-Certain Measures Relating to Solar Cells and Solar Modules: Request for Consultation by the United States*, February 10th, 2014, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=227150,227076,227077,131173,127300,124094,122744,122489,115067,114914&CurrentCatalogueIdIndex=7&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

6 *India-Certain Measures Relating to Solar Cells and Solar Modules: Request for the Establishment of the panel by the United States*, April 14th, 2014, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=227150,227076,227077,131173,127300,124094,122744,122489,115067,114914&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True. *See also*, *World Trade Organization: Dispute Settlement Body*, May 23rd, 2014, https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/.../WT/DSB/M345.pdf

7 https://www.wto.org/english/tratop_e/dispu_e/456r_a_e.pdf page 10

Article III:4 of the GATT provides that countries must accord national treatment to products of other countries, i.e. imported products "*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.*"[8] It was contended by USA that imported as well as domestic solar cells and modules are 'like' products within the meaning accorded to the term by Article III:4.[9] As such, an obligation would exist under Article III:4 to provide national treatment to imported solar cells and modules. Furthermore, the USA contended that the DCR measures under the National Solar Mission impose 'requirements' on the internal sale, purchase or use of imported solar cells or modules as the conditions of competition between domestic and imported solar cells and modules were impacted by the same.[10] Laying reference to *India – Auto*,[11] wherein the WTO panel had held that "*the very nature of [an] indigenization requirement generates an incentive to purchase and use domestic products and hence creates a disincentive to use like imported products*", the USA contended that the DCR under the National Solar Mission accorded imported solar cells and modules treatment that is less favourable than that provided to "like products" of domestic origin.[12]

Meanwhile, Article 2.1 of the TRIMs Agreement provides that No Member shall apply any Trade-Related Investment Measure (TRIM) that is inconsistent with Article III:4 of the GATT. Therefore, the United States contended that the logical corollary of the arguments in the foregoing paragraph would be that India's DCR was inconsistent with Article 2.1 of the TRIM's Agreement.

India, on the other hand, relied on the principle applied by the Appellate Body in *Thailand-Cigarettes*,[13] wherein the Appellate Body stated that, "*what is relevant is whether the regulatory differences distort the conditions of competition to the detriment of imported products*." To make a finding on less favourable treatment under Article III:4 of GATT, it would require the identification or

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8 General Agreement on Tariffs and Trade, 1994, Art. III:4

9 *India-Certain Measures Relating to Solar Cells and Solar Modules: Report of the Panel*, February 24th, 2016, Page 12, https://www.wto.org/english/tratop_e/dispu_e/456r_a_e.pdf

10 *Id.* at 13

11 Panel Report, *India- Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, April 5th, 2002, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds146_e.htm

12 Panel Report, *supra* note 9, at 14.

13 Appellate Body Report, Thailand-Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371/AB/R, July 15th, 2011, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=104148&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

elaboration of its implications for the conditions of competition. Merely drawing regulatory distinctions or providing different treatment does not necessarily amount to "less favourable treatment"[14] What is required is a careful scrutiny of the domestic content provisions in the bid related documents that are subject matter of the dispute.[15] India also submitted that the government procurement derogation under Article III:8(a) of the GATT, 1994 is applicable to the DCR measures howsoever that by virtue of it does not imply that the DCR is inconsistent with Article III.4 of the GATT, 1994 or Article 2.1 of the TRIMs Agreement.[16]India also thoroughly contested the applicability of the *Canada-Renewable Energy/ Feed-In Tariff Program*which the United States had vehemently relied on, India rejected the case on the context of different facts and no set of watertight compartmentalization.[17]

India provided a few more arguments without prejudice to its earlier stance, by taking up the defences under Article XX(j)[18] and Article XX(d)[19] of the GATT, 1994. The defences were on the rationale that India had an obligation to take steps *inter alia* to achieve energy security, mitigate climate change, generate clean electricity and also that the solar cells and solar modules are "general or local short supply" for the purposes of Article XX(j) and the DCR are aimed at the acquisition of solar cells and modules by Solar Power Developers engaged in Solar Power Generation.

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14 Panel Report, *supra* note 9

15*Id.*

16 Article III:8(a) provides that, "*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.*"

17The focus on the DCR under Canada's programme was on materials and activities for the development and construction of the power plant, including labour requirements for such construction and development, rather than on generating electricity from the plant. Panel Report, *Canada-Certain Measures Affecting the Renewable Energy Generation Sector/Canada- Measures Relating to the Feed-In Tariff Program*, May 24th, 2013, WT/DS412/R, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm

18**Article XX(j)** establishes a general exception. It provides that nothing in the GATT 1994 shall be construed to prevent the adoption or enforcement by any Member of measures: essential to the acquisition or distribution of products 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 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.

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

Whilst rebutting the stance of the United States on TRIM's Article 2.1, India relied on the Appellate Body's interpretation of this Article and the TRIM's Agreement in *Canada-Renewable Energy/ Canada-Feed-in-Tariff Program*[20] which stated that, "Paragraph 1(a) of the Illustrative List in the Annex to the TRIM's Agreement did not obviate the need for panel to undertake an analysis of whether the challenged measures are outside the scope of application that Article III:4 of the GATT, 1994." The fact that the United States has not made a claim under the TRIM's Agreement and has linked the finding under the TRIM's Agreement to a finding of violation of GATT is unacceptable. *The WTO jurisprudence succinctly finding that the TRIM's Agreement does not obviate the need for an analysis of the measure under GATT and hence the consistency with the GATT Article III:4 should be first analyzed followed by the analysis of the allegation of violation of the TRIM's Article 2.1.*

III. FINDINGS OF THE PANEL ON THE GATT, 1994 AND TRIMS AGREEMENT

The claims brought by the United States in relation to DCR imposed under the JNNSM was dealt with the Panel individually with quite peculiar reasoning and interpretation provided to the GATT, 1994 Articles. The JNNSM Mission Document states that the National Solar Mission aims "*to promote ecologically sustainable growth while addressing India's energy security challenges*". The WTO analyzed the DCR measures on the understanding of the WTO Laws, and not on the legitimacy of the policy objectives pursued through the National Solar Mission. The panel analyzed the point in issue of whether the measures falling under Paragraph 1(a) of the TRIM's Illustrative List are inconsistent with Article III.4 of the GATT, 1994. Cognizance of *Canada-Renewable Energy/ Feed- In Tariff Program* was taken by the panel in interpreting the abovementioned issue.[21]The panel then decided that TRIM's falling under paragraph 1(a) of the TRIM's Illustrative List are necessarily inconsistent with Article III.4 of the GATT, 1994. The logical question which arose was whether the DCR measures fall under paragraph 1(a) of the TRIM's illustrative List. Cognizance was laid on the objective of the mission, "[t]he objective of the mission is to create a policy and regulatory environment which provides a predictable incentive structure that enables a rapid and large-scale capital investment in solar energy applications and encourages technical innovation and lowering of costs."[22] The need to incentivize capacities for

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20 Panel Report, *supra* note 17

21 Panel Report, *supra* note 17

22 *Resolution, Jawaharlal Nehru National Solar Mission*, Ministry of New and Renewable Energy, January 11th, 2010, http://www.mnre.gov.in/solar-mission/jnnsm/resolution-2/

manufacture of cells and modules, is a testament to the fact that the "mission and vision" can be considered an "incentive measure" thereby landing within the meaning of the TRIM's agreement.

The three elements that are essentialities which must be demonstrated for the measure to be found inconsistent with the treatment obligation of Article III.4 of the GATT, 1994 are:

(a) That the imported and domestic products in question are "like products";
(b) That the measure at issue is a "law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use"; and
(c) That the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[23]

With respect to the first element, the panel previously in *Canada-Autos*,*Turkey-Rice* and *Argentina-Import Measures,* have found that the products at issue were like where the sole distinguishing criterion was origin.[24] The panel laid its conclusion on the sole imposition of the criterion of origin and held that the DCR measures indeed apply to "like measures". The Panel laid out that the measures which covered by Article III.4 of the GATT 1994 include "conditions that an enterprise accepts in order to receive an advantage"[25]and such a measurethat "create an advantage or an incentive" for use of domestic purpose over imported goods can affect the internal sale of goods. Less favourable treatment pertains to whether a measure modifies the conditions of competition in the market to the detriment of imported products, such that the term treatment no less favourable under Article III.4 requires effective quality of opportunities

23 Appellate Body Report, *Korea-Various Measures affecting the Imports of Fresh, Chilled and frozen beef,* WT/DS161/AB/R, WT/DS169/AB/R, January 10th, 2001, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds161_e.htm

24 *See*, Panel Reports, *Canada-Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, June 19th 2000, modified by the Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds139_e.htm; Panel Report, *Turkey-Measures Affecting the Importation of Rice*, WT/DS334/R, October 22, 2007, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds334_e.htm; Panel Reports, *Argentina- Measures Affecting the Importation of Goods*, WT/DS438/R and Add. 1/ WT/DS445/R and Add.1, January 26, 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R, WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R, https://www.wto.org/english/tratop_e/dispu_e/438_444_445r_e.pdf

25 *Id.* at Panel Report, *Canada-Autos*, para. 10.73. *See alsoId.* at Panel Reports, *Turkey-Rice*, paras. 7.218-7.219

for imported products to compare with the domestic products.[26] Based on the foregoing the panel held that there was a less favourable treatment under Article III:4 of the GATT, 1994

The Panel also rejected India's defences by distinguishing the wordings of the Articles of the GATT, 1994by enumerating that 'products in general or local short supply' does not refer to 'products of natural origin in general or local short supply'. Above all, the Panel relied on the decision of *Mexico-Taxes on Soft Drinks*which interpreted the term laws or regulations to refer 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.[27]

IV. WTO VERDICT: A HERCULEAN BLOW TO THE EFFORTS OF THE DEVELOPING COUNTRIES FOR SUSTENANCE

By heading and founding the International Solar alliance[28] and ratifying the Paris Climate Agreement,[29] India had made its commitment towards tackling climate change and its desire to not shy away from taking the leadership mantle aptly visible. This dispute marked the first time that a WTO member used climate change imperatives to justify an alleged violation.[30] However, the WTO's rejection of this contention deals a heavy blow not only to India's attempts to move towards clean, non-fossil sources of energy but also to the global climate change movement in general; it lends weight to the argument that hardened trade ideologies outweigh climate change concerns time and again.

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26 Panel Reports, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and Add. 1 and WT/DS401/R and Add. 1, June 18, 2014, as modified by the Appellate Body Reports WT/DS400/AB/R and WT/DS401/AB/R, https://www.wto.org/english/tratop_e/dispu_e/400_401r_e.pdf

27 Appellate Body Report, *Mexico-Tax Measures on Soft Drinks and Other Beverages*, WT/DS161/R, adopted January 10, 2001, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds308_e.htm*See generally*, McGivern, B., *WTO Panel Report: India- Solar Cells and Modules*, White & Case WTO Report, February 26, 2016, https://www.whitecase.com/publications/alert/wto-panel-report-india-solar-cells-and-modules

28 Press Release, *International Solar Alliance will be the First International and Inter-Governmental Organisation of 121 Countries to have headquarters in India with the United Nations as the Strategic Partner*, Government of India: Ministry of New and Renewable Energy, January 25, 2016, http://pib.nic.in/newsite/PrintRelease.aspx?relid=135794

29 India to ratify Paris Climate Change Agreement at UN, The Guardian, October 2, 2016, https://www.theguardian.com/environment/2016/oct/02/india-paris-climate-change-agreement-un-narendra-modi

30 White & Case WTO Report, s*upra*note at 27

The Panel's verdict impacts not only India but also other developing countries with budding solar programmes. The Sri Lankan renewable energy programme is still in nascent stages, though Sri Lanka's demand are far lesser than those of India, it would have also saved a considerable amount of money had this ruling not come and becoming a binding precedent for other developing countries.By forcing western technology down the throat of developing countries, the WTO has acted in a manner that may be best described as colonial and high handed. The WTO has conveniently turned a blind eye towards the fact that India is not the only country to have imposed DCR. Countries like Germany and Denmark, China, Brazil and Spain owe a large chunk of the success of their renewable energy programmes to DCR.[31] In fact, overproduction in European countries and enormous subsidies in the United States and China lead to dumping in India, which in turn was partially responsible for the imposition of DCR. India opted for imposing a mere DCR as contrasted to the USA, which imposes an anti dumping duty apart from providing federal subsidies to the tune of $40 Billion a year.

From an economic perspective, the 'necessity' and 'essentiality' of having a DCR requirement for developing countries like India, Bangladesh and Sri Lanka can at best be understood only by other developing countries. Incentivising domestic manufacturing through a DCR proves to be a great boon to the countries domestic manufacturing base. Apart from generating jobs and providing clean energy, it also leads to the concerned country saving considerable amounts of money. A 2015 KPMG report claimed that India could save $42 billion by 2030 by pushing domestic manufacturing of solar power equipment.[32]

The need of the hour is to shift the world's energy burden towards renewable energy. Apart from its pro environment benefits, the need for having affordable renewable energy programmes for developing countries cannot be ignored. In light of these compelling realities, it becomes the moral and ethical responsibility of developing countries such as India to pressurise the developed world to have a rethink of the colonial trade policies being propagated by bodies like the WTO.

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[31]Editor's Note, Crushing a Fledging Industry: WTO's recent rulingon against India's Solar Mission will have long-term negative impacts, Economic & Political Weekly, March 12, 2016, http://www.anilkeshri.com/pdf/Crushing_a_Fledgling_Industry_0.pdf

[32]Energy and Natural Resources: The Rising Sun- A point of view on the Solar Energy Sector in India, KPMG Working Paper, May, 2011, https://assets.kpmg.com/content/dam/kpmg/pdf/2015/04/the-rising-sun-may-2011.pdf