

# SOLAR TODAY

India's First Magazine Dedicated to Emerging Solar Industry

Vol. 2 • No. 4 • May - June 2016 ₹150

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## *India's restrictive measures on solar procurement*

The WTO's ruling against India's DCR policy explained in a nutshell.

**I**t all began with the introduction of the national missions by the Manmohan Singh government in 2010 to promote and supplement sustainable growth. Aiming to make India's economic development energy efficient, the government in its guidelines for selection of new grid connected solar power projects, stressed on the need to gradually shift from economic activity based on fossil fuels to one that is based on renewable energy.

The Jawaharlal Nehru National Solar Mission (the Mission) was launched under the brand name 'solar India' to establish India as a pioneer in solar energy, to create policies that would assist in diffusing solar energy across the length and breadth of the country at the fastest possible pace, and to achieve grid parity by 2022.

The Mission was to be divided into

three phases. Phase I spanning a period from 2012 to 2013, Phase II spanning a period from 2013 to 2017, and Phase III spanning a period from 2017 to 2022. The original target set by the Manmohan Singh Government was to achieve production of 20 GW of energy by 2022, which was later revised by the NDA-led government to 100 GW in the 2015 Union Budget.

### **Domestic Content Requirement (DCR)**

The Mission was thrust into international limelight when the United States (US) trade representative filed a complaint with the World Trade Organization (WTO) stating that India's DCR violated international trade laws—specifically the 'National Treatment Principle' (NTP) under General Agreement on Tariffs and Trade, 1994 (GATT).

Conceptually, an agreement on the NTP meant that there will be not disparity in tariff or in terms of restrictions between domestic products and imported products. However, in order to make a successful bid under the Mission in India, the applicant was required to satisfy DCR. This essentially meant that developers were expected to procure the solar cells and modules from domestic manufacturers to be eligible to bid. In a bid to give an impetus to manufacturing in India, the guidelines specifically stated that it would be mandatory for projects based on crystalline silicon technology to use modules manufactured in India for solar power projects.

The US protested against this DCR in Phase II of the Mission, stating that this discriminates the products exported by US and is against the NTP.





Amongst various other defenses, the three key arguments by India to claim exemptions from the requirements of the NTP are as follows:

### 1. Government Procurement

Amongst various other defenses to the above protest, India contended that DCR was exempted under Article III: 8(a) of the GATT which provided for "...requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale..."

Although the panel upheld India's contention that the 'requirement' and the 'procurement was by a government agency', it was non-committal on the whether it fell squarely within the rest of the exemption, i.e., whether the procurement was 'for government purposes'. It was however the subject matter of the procurement, i.e., products – (solar cells and modules) which finally led the panel to conclude that the exemption cannot be availed by India.

The bone of contention here is that under the Mission, India was required to enter into long term purchase contracts to purchase electricity, the exemption sought for was concerning procurement of solar

cells and modules. While India contended that the term procurement should not be relegated to mere acquisition of the end product, but to all components which are in the nature of indispensable and integral to the final product, the opposite parties contested this view by referring to the solar cells and modules are mere 'inputs'. India further argued that the Mission "needs to be seen in the context of the products in question which pertained to a range of equipment required for the development and construction of the electricity generation facility as a whole".

The panel was however not inclined to accept India's argument as an assumption to products to specific integral inputs would mean that the other conditions and exemptions would likely be attracted to such integral inputs and not to the final product being the electricity purchased/procured by the government.

It is interesting to note that the panel merely relied on the argument that accepting the contention would stand foul of applicability of various other conditions and exemptions under the GATT. It has however not clearly distinguished as to how the said exemption could otherwise be independently applied to each of the

components forming part of the entire procurement process of power generation. The panel also failed to clearly appreciate the integral nature of the component of solar cells and modules to the presumptive end product being the electricity generated through its procurement.

The panel gravely erred in relying on 'Canada – Renewable Energy/ Feed-In Tariff Program', as India contends that the facts and circumstances therein cannot be read out of context and have no direct relevance to the instant issue. Although India acknowledges that the said dispute relates to 'use of designated percentages of equipment for setting up a renewable energy generation facility', it argues that the issues therein pertain to certain designated activities in a power plant and not to integral and indispensable products relating to power generation, viz-a-viz solar cells and modules.

Deciding on the issue, the panel found the DCR to be inconsistent with India's treaty obligations under the global trading regime.

### 2. Products in general or local short supply

One of the key arguments by India to allow the restrictive condition is that it squarely falls within the exemption set out in Article XX(j) of the GATT, which largely allows for restrictions in cases of 'products in general or local short supply'. India argued that in order to meet its obligation of meeting its need to ensure sustainable development through clean energy methods, it is imperative that there is adequate reserve of domestic manufacturing capacity for solar cells and modules in case of disruption in supply of foreign solar cells and modules. India also contended that it presently relies heavily on foreign import of solar cells and modules. It referred to this as 'emergency reserve'.

Although the US agreed to the legitimacy of the defense made out, it nevertheless contested that the definition and meaning of 'products



in general or local short supply' on the ground that it does not apply to the instant procurement of solar cells and modules. The US argued that India failed to demonstrate that the measures are essential to the acquisition of solar cells and modules, because there are several less trade restrictive and WTO consistent alternative measures that India could take to reduce the risk of disruption in Indian developer's access to continuous and affordable supply of solar cells and modules.

At the outset, the panel interpreted 'products in general or local short supply' to mean a situation in which the quantity of available supply of product does not meet demand in the relevant geographical area or market. Based on the said interpretation, the panel disagreed with India's contention that 'lack of manufacturing capacity of cells and modules amounts to a situation of local and general short supply of solar cells and modules in India'.

The panel concluded that it refers to a situation where the quantity of available supply of a product, from all sources, does not meet demand in a relevant geographical area or market and does not mean a mere lack of domestic manufacturing capacity. The panel also refuted India's concern that a risk of shortage of the cells and modules would attract the exemption as a mere risk cannot be construed to be 'products in general or local short supply'.

It appears that the panel largely arrived at its conclusions from a detailed, albeit piecemeal analysis of two separate reports. A large part of the analysis was spent determining the meaning and interpretation of 'products in general or local short supply', while largely ignoring the context and use of the said terminology. An understanding of lack



of available domestic manufacturing capability and the directly associated risk of having to rely solely on imports

## The WTO panel merely relied on the argument that accepting the contention would stand foul of applicability of various other conditions and exemptions under the GATT

was read into by the panel and analyzed independent of each other leading to erroneous conclusions.

### 3. Compliance with laws and regulations

India relied on a general exemption under Article XX(d) of the GATT which allows for such restriction which is necessary to secure compliance with 'laws or regulations' which are not inconsistent with GATT.

India argued that the restrictive measures were justified under the above provision as these measures are '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'.

In determining if several international and domestic instruments identified by India are 'laws or regulations' within the meaning of Article XX(d) of the GATT, the panel held that apart from Section 3 of the Electricity Act, 2003, India

failed to demonstrate that the international and domestic instruments were 'laws and regulations' within the meaning of the aforesaid Article. As regards Section 3 of the Electricity Act, 2003, the panel noted that the restrictive trade measure was not required to secure compliance with the legal obligations of this provision.

We note that the 'Make in India' initiative, coupled with the Supreme Court decisions calling for sustainable energy initiatives, though notable, do not fall within the ambit of 'laws or regulations' as required under the above Article. In the absence of a clear substantive domestic law or a regulation compelling India to impose the trade restriction, India did seem to a far less ground to substantiate its right to claim a general exemption under the above article.

### Conclusion

This ruling has proved to be a serious setback to the optimistic objectives of the Mission as well as India's ambitious domestic manufacturing policy. Given the detailed analysis of various issues by the panel, India's ability to strongly refute some of the key basis to the ruling may be limited. India has recently filed its appeal to the ruling. It will need to be seen if the appellate body will find merit in the appeal.

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