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Second Anniversary Issue

Dear readers

It gives me great pleasure in bringing out this second anniversary issue of International Trade Amicus. One can always look back with nostalgia but only rarely one gets an opportunity to look back with pride. In the past two years, your International Trade Amicus has grown in size and reach. Many of the articles have been appreciated by the readers. I sincerely thank everyone who has written to us about the articles and other items published in the newsletter.

We intend to introduce a number of modifications to the format and style over the next few months. We would strive our best to bring you international trade / trade remedy / WTO related news in a more reader-friendly manner and to enrich your reading experience. I request you to send us your opinions on the contents of the newsletter as often as possible. We take your opinions very seriously. With your active participation, we will take the International Trade Amicus to greater heights! Thank you very much.

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Executive Partner and CEO,
Lakshmikumaran & Sridharan, India.

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India — Certain measures relating to solar cells and solar modules – Open and shut case?

By **Bhargav Mansatta**

On 6 February 2013, the United States requested consultations with India concerning certain measures of India under the Jawaharlal Nehru National Solar Mission ("NSM") for solar cells and solar modules. The requirement in the policy triggering the dispute provides that electricity manufacturers using renewable source of energy will be required to source minimum amount of inputs from local manufacturers. This requirement allegedly discriminates between domestically manufactured product and the like imported product and thereby distorts competitive conditions between like products.

The United States claims that the measures providing for such domestic content requirement appears to be inconsistent with:

- Article III:4 of the GATT 1994;
- Article 2.1 of the TRIMs Agreement; and
- Articles 3.1(b), 3.2, 5(c), 6.3(a) and (c), and 25 of the SCM Agreement.

This is not the first time that the domestic content requirement under the renewable energy generation program of any government has been called into question. Similar measures by Canada (DS/426) and certain countries of European Community (DS/452) came under the WTO challenge. While the final outcome of the dispute in DS 452 and DS 456 is awaited, it appears that the Appellate Body report in DS 426 issued on May 6, 2013, where similar domestic content requirement by Canada in its Ontario renewable energy program was brought under challenge, has finally put curtains on the WTO issue of the consistency of domestic content requirements in these policies. The interpretation developed by Appellate Body, as explained below is likely to hold true for all the pending and potential disputes involving local content requirement in renewable energy projects.

The most critical legal challenge in these cases was arising out of the fundamental principle of national treatment enshrined in Article III: 4 of GATT 1994. The analysis contained herein is limited to this provision alone.[1] Simply put, domestic content requirement in the laws or regulations of member countries results in violation of national treatment principle i.e. rule of non-discrimination between the imported product and the like domestic product. However, it was being seen as to whether such a requirement in case of renewable energy projects could fall under the exception to this general principle.

Article III:8(a) provides that the principle of national treatment shall not apply in case of government procurement of goods. Article III:8(a) reads as below:

(a) The provision 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.

[1] Inconsistency with Article III:4 alone will be sufficient under the WTO for the Panel to recommend that the measure be brought into conformity with the Agreement. This may ultimately lead to withdrawal of the domestic content requirement.

Before the aforementioned exception can be invoked successfully by any member country to defend its domestic content requirement, following are required to be established:

1. Domestic content requirement is *governing* the procurement
2. Procurement is by *governmental agencies*
3. Procurement is for *governmental purposes* and not with a view to *commercial resale*

It was argued that the measure in question is government procurement of electricity and requirement upon the manufacturers of electricity to procure locally manufactured inputs and components is an intrinsic requirement governing such procurement and such procurement is for governmental purpose i.e. providing electricity and it is by governmental agencies and finally it is not with a view to commercial resale as it involves no profit element.

Typically a domestic content provision will require renewable electricity producers to procure components or inputs from domestic manufacturers. This requirement is also a part of India's NSM which is currently under challenge before the WTO.[2] The interpretation of the word 'governing', 'governmental agencies' and 'governmental purposes' was of crucial importance for deciding whether the measure would be covered under Article III:8(a) or not.

The Appellate Body in DS 426 has now observed that requirement 'governing' procurement must articulate a binding connection between the procured goods and the legal instrument. This would not be possible if the product ultimately procured by governmental agencies and the product being discriminated against, are entirely different. It notes:

"laws, regulations, or requirements "governing" procurement must articulate a connection between those legal instruments and procurement in the sense that the act of procurement is taken within a binding structure of laws, regulations, or requirements. We acknowledge that, under the challenged measures, a connection is articulated between the procurement of electricity and the Minimum Required Domestic Content Levels regarding generation equipment. However, in our view, this connection under municipal law is not dispositive of the issue, because Article III:8(a) imposes also other conditions….. *conditions for derogation under Article III:8(a) must be understood in relation to the obligations stipulated in the other paragraphs of Article III. This means that the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased. In the case before us, the product being procured is electricity, whereas the product discriminated against for reason of its origin is generation equipment. These two products are not in a competitive relationship. None of the participants has suggested otherwise, much less offered evidence to substantiate such proposition. Accordingly, the discrimination relating to generation equipment contained in the FIT*

[2] Guidelines for Selection of New Grid Connected Solar Power Projects, Jawaharlal Nehru National Solar Mission : Building Solar India, June 30 2008, available at *www.mnre.gov.in*

Programme and Contracts is not covered by the derogation of Article III:8(a) of the GATT 1994."[3]

Despite some variance in the renewable energy policy of Canada, India and European Union, the fact that the product being procured is electricity, whereas the product discriminated against for reason of its origin is generation equipment (i.e. anything other than like product of electricity) is constant for all renewable energy policy. There is no reason to believe that similar approach will not be followed in DS 456 and DS 452 as well. Consequently, the issue of whether the procurement of electricity is by governmental agency or for governmental purposes or with a view to commercial resale etc. is only of academic interest and becomes moot for practical purpose.

If the policy, as it exists today, and as it is challenged before the WTO, finds no coverage under Article III:8(a) of GATT 1994, there is apparently no alternative route through which the inconsistency of it with the fundamental principle of national treatment can be avoided.

The Appellate Body has reversed the earlier interpretation developed by the Panel in which panel had not found it necessary that the product being procured and the product being discriminate against have to be like products. It has adopted a very strict interpretation of the word 'governing'. One should also recollect that the national treatment principle in Article III of GATT is a foundation stone of the multilateral trading. The Appellate Body has effectively indicated its resistance to the derogation from such principle.

Though there is no rule of *stare decisis* in WTO, one can safely assume considering the history of WTO jurisprudence and soundness of the interpretation adopted by the Appellate Body that it will be followed subsequently. This will ensure security and predictability to the multilateral trading system which is again one of the fundamental principles of dispute settlement body enshrined in Article 3.2 of the WTO Dispute Settlement Understanding (WTO DSU).

Thus, considering the latest jurisprudential development in this precise provision, India's solar policy may not be considered as WTO compatible.

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[3] Appellate Body Report, *Canada — Feed-In Tariff Program,* Para. 5.79

Trade Remedy News

Anti-dumping / safeguard actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Phenol	South Africa	10/2013-Cus. (ADD)	3-5-2013	ADD to continue till 30-10-2013
Phenol	Singapore, EU	10/2013-Cus. (ADD)	3-5-2013	ADD withdrawn
Peroxosulphates	China, Japan	11/2013-Cus. (ADD)	16-5-2013	ADD re-imposed for five years
Dry cell batteries	China	15/12/2011-DGAD	20-5-2013	ADD not to be continued as per recommendation on sunset review
Pentaerythritol	Saudi Arabia	14/11 /2011-DGAD	23-5-2013	Time to complete investigation extended till 21-11-2013
Resin or other organic substances bonded wood or ligneous fibre boards of thickness below 6mm	China, Indonesia, Malaysia, Sri Lanka	No.14/29/2010-DGAD	10-5-2013	Imposition of definitive ADD recommended
Hot Rolled Flat products of Stainless Steel of 304 grade	China	GSR D-22011/06/2012	25-5-2013	Provisional safeguard duty confirmation recommended

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Polyethylene terephthalate (PET)	EU	2013/226/EU	23-5-2013	ADD withdrawn after expiry review
Polyethylene terephthalate (PET)	EU	Council Implementing Regulation (EU) No. 461/2013	23-5-2013	Definitive countervailing duty imposed following expiry review
Stainless steel wires	EU	Commission Regulation (EU) No. 418/2013	3-5-2013	Provisional ADD imposed

WTO News

Argentina seeks consultation with EU on biodiesel import

Argentina has, on 15-5-2013, sought consultations with the European Union, on certain measures by EU relating to importation and marketing of biodiesel and measures supporting the biodiesel industry. As per the provisions of EU, the biofuels and bioliquids must conform to certain criteria so as to be taken into account when measuring compliance with the targets of the EU Member States in the field of renewable energy and in order to benefit from the incentives for their use. To be considered sustainable, these products must result in the saving of at least 35% of greenhouse gas emissions with respect to fossil fuels. According to Argentina, the threshold of 35% is arbitrary, not scientifically justified and not based on recognized international norm or standard. As per the note circulated in the WTO on 23rd of May, Argentina considers these provisions as violative of Article I.1, III.1 and III.4 of the GATT 1994, Article 2.1, 2.2, 5.1 and 5.2 of the TBT Agreement and Article XVI.4 of the Marrakesh Agreement. Further, Argentina is also contesting certain measures of Belgium, France, Italy and Poland placing indirect restriction/ prohibitions on import of biodiesel. Presently EU has imposed provisional anti-dumping duties on the said products from Argentina with effect from 28-5-2013, while investigations are already underway on anti-subsidy proceedings.

Canada's domestic content requirement in renewable energy sector violates WTO provisions

The Appellate Body of the Dispute Settlement Body of the WTO has issued its report on 6th May, 2013 in DS412 and DS426 holding that the minimum required domestic content levels prescribed under Canada's Feed-In Tariff ("FIT") Program and related FIT and micro-FIT contract programmes do not meet the conditions of the derogation in Article III:8(a) of the GATT 1994 and that such levels prescribed under said programmes are inconsistent with Article 2.1 of the TRIMS Agreement and Article III:4 of the GATT 1994. The Appellate Body however rejected the contentions of Japan that these programmes may also be characterized as "direct transfer of funds" or "potential direct transfers of funds" under Article 1.1(a)(1)(i) of the SCM Agreement.

Major findings of the panel report issued in December 2012 have been upheld by the Appellate Body. It, however, reversed the earlier finding, that the European Union and Japan failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement and thereby Canada acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement. The dispute concerned the domestic content requirements that certain generators of electricity using solar photovoltaic and wind power technology must comply with in the design and construction of electricity generation facilities in order to qualify for guaranteed prices offered under the FIT program. *For news on panel report issued in December, 2012, refer International Trade Amicus - January 2013 issue at*

http://www.lakshmisri.com/News-and-Publications/Publications/Newsletters/International-Trade-Amicus/International-Trade-Amicus-January-2013

Labelling requirements - USA amends its law to comply with DSB's appellate body directions?

USA's country of origin labelling requirements, popularly known as US COOL, regarding certain meat products, have been amended, as stated by the

US, to comply with the WTO's Dispute Settlement Body's directions in its report dated June 2012 (DS384). Under the earlier US COOL provisions an article could be marked as of US origin when the livestock from which it is processed was born, raised and slaughtered in US only. Now the provisions have been amended to require the origin designations to include information about where each of the production steps, such as where an animal was born, raised and slaughtered, occurred. According to USA, the amendment removes the allowance for commingling of the meat from various sources. The WTO had earlier ruled that the basic provisions discriminated against the Canadian and Mexican livestock which were born in Canada or Mexico but were raised and slaughtered in US, as they were given a different label which was not clear in the message/information passed on to the customer. USA states that the amendment brings its law in line with the directions of the WTO. However, as per reports, both Canada and Mexico, who had taken the matter to the WTO, are making their concerns vocal against the latest developments, terming it as worse than what it was before and are also weighing options of use of any retaliatory measures against the US in this regard.

News Nuggets

Customs valuation databases not to be used for reference prices

The World Customs Organisation (WCO) has recommended that its members use customs valuation databases as a risk management and analysis tool and not use them to set minimum values for the purposes of customs valuation. As per communication received from the Chairman of the Technical Committee on Customs Valuation, International Chamber of Commerce (ICC) has expressed concern about misuse of customs valuation databases by the members when they use them to set minimum values or reference prices. This communication dated 15-5-2013 also notes that customs valuation databases are not an essential component of customs valuation control programme for those administrations that have developed programmes which principally use post-clearance audits based on the profiling of importers. The matter will be brought to the attention of the Technical Committee on Customs Valuation at its October, 2013 session.

Shrimp imports – US DOC announces preliminary subsidy rates

The US Department of Commerce has, on 29th May, 2013, announced preliminary subsidy margins in the subsidy investigations against certain frozen warmwater shrimp imported from specified countries. In the case of imports from India, the DOC has preliminarily determined that the exporters, Devi Fisheries Limited and Devi Seafoods Ltd., received subsidy rates of 10.41% and 11.32%, respectively. All other producers/exporters in India have been assigned a preliminary subsidy rate of 10.87%. The relevant communication states that due to the termination of certain subsidy programmes prior to such preliminary determination, adjusted subsidy rates have been applied and therefore, the cash deposit rate will be 6.10% in the case of Devi Fisheries, 5.72% in respect of Devi Seafoods and 5.91% for others. Final determination will be announced on 13th August, 2013.

Export of LNG to non-FTA countries

Putting a cap on the issue of export of LNG to countries with which the USA does not have a free trade agreement, the Department of Energy (DOE) issued an order permitting such exports. According to DOE such move would not be against public interest nor affect supply to domestic consumers. The DOE states that it was guided by the long-standing principle established in Policy Guidelines that resource allocation decisions are better left to the market, rather than the department, to resolve.

The issue of ban on export of natural gas is yet another classic case of clash of ideals of free trade and domestic needs. The natural question was does 'domestic' cover only corporations who will face shrinking margins if the gas is allowed to be exported or should the manufacturers be allowed to get the best prices in the international market. Challenging China's ban on export of rare earths the US (among others) had argued that it was violative of Article XI of GATT by imposing quantitative restrictions. Ruling on a similar issue in respect of raw materials, the WTO held that China's restrictions were violative and China's plea of environment conservation was not found forceful.

The DOE order dated 17-5-2013 permits the export of LNG subject to satisfying environmental review and other terms and conditions. Answering the environmental concern, it was argued that LNG is least polluting. But, the process of hydraulic fracturing and drilling to produce natural gas has been under attack from environmentalist groups.